(26,176)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 709.

A. P. CHALKER, ADMINISTRATOR *DE BONIS NON* OF THE ESTATE OF J. W. WRIGHT, JR., DECEASED, AND C. E. PIGFORD, PLAINTIFFS IN ERROR,

vs.

THE BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY, THE JACKSON CONSTRUCTION COMPANY, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 27, 1917.

1 *Original Bill.*

Filed March 19th, 1912.

To the Honorable E. L. Bullock, Chancellor of the Eighth Chancery Division, holding Court at Jackson, Tennessee for the County of Madison, State of Tennessee:

The bill of complaint of J. W. Wright, Jr., a resident of the State of Alabama, and a non-resident of Tennessee, filed against Birmingham and Northwestern Railway Company, a corporation chartered and organized by and under the laws of Tennessee and a resident of Jackson, Madison County, Tennessee; Jackson Construction Company a corporation chartered and organized by and under the laws of Tennessee, and a resident of Jackson, Madison County, Tennessee, and R. M. Hall, a resident of Dyersburg, Dyer County, Tennessee.

First.

Your complainant would most respectfully state and show unto your Honor that the defendant, Birmingham and Northwestern Railway Company was on or about the — day of August, 1910 chartered and organized by and under the laws of Tennessee, applicable to chartering railroads, the objects and purposes of said incorporation as specified in and by its charter being for the purpose of constructing a railway from the City of Jackson in the County of Madison, State of Tennessee, running in a northwesterly direction through the county of Crockett to Dyersburg in
2 the County of Dyer, State of Tennessee, with an authorized capital of Three Hundred Thousand Dollars.

That said Charter was taken out and registered in Madison County, Tennessee, and said corporation has its chief offices and situs at Jackson, Tennessee, and is a resident of Madison County, Tennessee.

That the defendant, R. M. Hall, was the chief instigator and promoter of said corporation and now publishes to the world on the stationery of said corporation that he is the President of the same. He charges that the objects and purposes of said incorporation was to have constructed a line of railway from Jackson, Tennessee and through the County of Madison in a Northwesterly direction passing through Bells, Alamo and Friendship and through the County of Crockett and on to Dyersburg in the County of Dyer, the course of said line of railway being in a northwesterly direction.

That in building and constructing said railway, it was necessary to construct and build the same by embankments, fills, cuts, culverts, trestles, laying ties, rails, and all other work necessary in the construction of a railway including the main line, switches, switch tracks and terminals.

That though the authorized capital stock is stated to be three Hundred Thousand Dollars, yet as a fact, as complainant is informed and believes, *that* a very small portion of same was actually issued or paid for bona fide.

That on or about December —, 1910, the Jackson Construction Company was chartered and organized by and under the laws of the State of Tennessee, the charter being taken out and registered at Jackson, Tennessee, where it has its chief offices and situs,
3 and is a resident of Madison County, State of Tennessee. The authorized capital of said corporation as set out in its charter being $5000.00. How much of said stock has been issued complainant cannot state, but he is informed that a very small portion, if any, has been issued.

The purpose of said corporation as set out in the charter being for "Constructing, building and erecting for other persons or corporations, railroads, street railroads, inclined railroads, bridges, locks, dams, houses or other public or private buildings or improvements * * *"

From information and belief he charges that the defendant R. M. Hall was the instigator and promotor of said corporation for the purpose of letting the contract to construct said railway from Jackson, Tennessee, to Dyersburg, Tennessee.

That said R. M. Hall is the President of said construction Company and has had the active management of same.

That both of said corporations were promoting schemes by which it sought to acquire for the railway company rights-of-way, subscriptions, donations and bonds from the City of Jackson and Dyersburg and then contract with the construction Company to build same based on the subscription. In other words, the public was expected to finance the two concerns and the promotors and especially the defendant, R. M. Hall expected to be benefited "both going and coming" as the saying is.

Second.

Complainants would most respectfully state and charge from information and belief that sometime in 1910 or the earlier part of 1911, the Birmingham and Northwestern Railway Company contracted with the defendant the Jackson Construction Com-
4 pany, to construct its line of railway from Jackson, Tennessee, to Dyersburg, Tennessee, this contract being manipulated by the defendant, R. M. Hall, who was the dominant spirit of both corporations. The terms and conditions of said contract complainant is not advised or informed.

That though the contract was made with the Jackson Construction Company to build said railway, yet as a fact it was never intended or contemplated that said Construction Company would actually build said railway or do the work, but that it was contemplated that it should sub-let contracts, as he is informed and believes.

That in order to build and construct said line of railway, it was

necessary for said railway to acquire the right-of-way of at least one hundred feet wide, from the land-owners through whose lands the railway would run. That there was a great many land-owners through whose land the line runs and the right of way had to be acquired by purchase, donations, or condemnation proceedings by said railway which took considerable time.

Third.

Complainant would most respectfully state that on or about the 13th day of April, 1911, the Jackson Construction Company, by its President, the defendant, R. M. Hall, contracted with your complainant for certain work, labor and services in the building and construction of said railway. The terms and conditions of said contract were more specifically set out in a copy of the same, with copy of the specifications, made a part of said contract, the contract being signed by the Jackson Construction Company, by defendant, R. M. Hail, its President and by your complainant, which is made a part of this bill as exhibit "1," but same not to
5 be copied unless called for.

By the terms of said contract complainant was to do and perform certain services and labor specifically set out in said contract and specifications, which specifications were made a part of the contract.

Among other work and labor the Construction Company agreed for complainant to do, and for which it agreed to pay him were grading, excavations, and embankments, for the formation of the roadbed for a single line and all necessary terminals and sidetracks; also preparations for depot grounds, sites for water station grounds, digging ditches, changing directions of streams and water courses, cutting down or raising highways or private crossings, excavations of all foundations, pits above water and all other excavations and embankments connected with or incident to the construction of the railroad, hauling, grading, laying cross-ties and rails and tracks, both on main line and side tracks, switches and terminals, frogs and switch connections, drain pipes, etc., and other work more specifically set out in the contract and specifications before referred to.

The price to be paid for the different character of work is set out under the Tenth paragraph of the contract, exhibit "1" to which reference is had without the necessity of repeating and enumerating same.

Complainant was not to furnish any of the materials, but the Jackson Construction Company was, by its contract, to furnish all materials on the ground when called for by complainant. Though the contract provides for the completion of the work in six months, yet by the delays of the Jackson Construction Company or the Birmingham and Northwestern Railway Company or both,
6 and R. M. Hall, or all, in procuring rights-of-way and delivering material, delays have resulted, and by the neglect of the defendants said provision has not been considered binding

and not imposed by the contract but in fact has waived and not relied on said provision but in fact the delays have been caused by the fault of said Construction Company.

It was expressly provided by and under the Tenth clause of said Contract that on or about the first day of each month during the progress of the work an estimate shall be made by the engineer of the construction of the work done up to such time, and upon his certificate of the amount presented to the proper official of the Company or such disbursing agent as the Company may appoint, the amount — said estimate, less a retained ten per cent and less previous payments, shall be paid to the contractor on or before the 20th day of each month for the work done in the previous month, at the nearest disbursing point of the company to the Contractor's office.

Fourth.

Complainant would further most respectfully represent unto Your Honor that as a part consideration of said contract, Exhibit one, and in order that the said Jackson Construction Company should faithfuliy perform its part of the contract and as a part of the same and as an inducement to complainant to enter into said contract and perform service and labor, the defendant, R. M. Hall, executed and delivered unto complainant a contract guaranteeing the faithful performance by the defendant, Jackson Construction Company, of its contract with complainant. The following is a copy of said guaranty.

7 "For a valuable consideration to the undersigned, R. M. Hall, in hand paid by J. W. Wright, Jr., the receipt of which is hereby acknowledged, I, the said R. M. Hall, do guarantee the performance of this contract on the part of the Jackson Construction Company and agree and bind myself to the payment of all sums of money that may be due thereunder to the said J. W. Wright, Jr., by the said Jackson Construction Company.

Witness my hand this the 17th day of April, 1911.

R. M. HALL."

Witness:
JNO. L. WISDOM.
R. B. HICKS."

Complainant would further charge that as soon as possible after the execution of said contract he proceeded to do the work as contracted by clearing and grubbing the right-of-way of said railroad, grading its roadbed, pits, driving, framing and decking trestles, track laying and surfacing, building cattle gaps and culverts, putting in road crossings, excavating dirt and constructing roadway and embankments, cutting ditches, hauling dirt, grading for earthwork, pile driving, building and constructing trestles, laying cross-ties, frogs, switches, switch tracks and turnouts, fitting over culverts and backing up masonry, laying pipes, and all other work and material,

covered by and included in said contract, and specifications, exhibit One. The same being done on the said railway from Jackson, Tennessee, to Dyersburg, Tennessee, in and about the construction of said railway, and all done and performed by and under said contract and all of which the said railway has received the use and benefit and is now using the same and is enjoying the benefits of the work and labor of the complainants.

Said work was done under much diff-culty and disadvantage by reason of the obstruction and contentions of the defendants,
8 and especially of the defendant, R. M. Hall, who has assumed to and did and does represent both the railway company and the construction company. He has thrown all the obstacles he possibly could in the way of complainant in performing his work under said contract.

The work and labor and materials furnished was to be done at and for the figures and prices set out under the Tenth Article of Exhibit One and the said labor and services were worth said prices.

Complainant would charge that defendants, especially defendant, Construction Company and R. M. Hall, have failed and refuse to furnish the estimates as provided by the Tenth Article of the contract Exhibit One, and pay for said work as contracted for.

He charges that defendants failed to acquire the rights-of-way in order that he could or might proceed with the work in such an expeditious manner as he could and without loss to him if they had been acquired as they should have been.

He charges that he contracted to labor and perform services under said contract on the construction of said railway until about the 14th of November, 1911, when a supplemental or Amended contract was entered into with said construction company which was signed in duplicate by complainant and the defendant, Construction Company by the defendant, R. M. Hall, its President. A copy of said supplemental contract is filed as Exhibit Two to this bill and asked to be taken as a part of the same, but not to be copied unless called for. Reference is had to said Exhibit Two for its conditions, etc.

9 The material changes in the contract were that complainant was released from surfacing the contract from Bells to Dyersburg and instead of being paid the sum of $625.00 per mile he agreed to receive $550.00 per mile.

It was contracted in said supplemental contract that the defendant, Construction Company, should furnish complainant two locomotives and fifteen flat cars to be used by him in the hauling of rail and other material, etc., he to pay all expenses of repairs, etc., as set out under sub-paragraph of clause seventh of said Amended Contract.

Fifth.

Complainant would further charge that under and by and in pursuance of said contracts he did work and labor in constructing said railway and has graded same up to Dyersburg and track laid to about 6¾ miles of Dyersburg. That he has done the kind and

character of work as required by his contracts. That the Construction Company and its President, R. M. Hall, have thrown as many obstacles as possible in his way in the performance of his work and has seemed to desire to force him to quit and thereby refuse to pay him for his work.

That they have declined, neglected and refused to deliver the material as contracted for in order that he might go and do the work.

That they have neglected and refused to deliver a large part of the cross-ties, rails, bridge timber and switch materials, spikes and angle bars and other material contracted for, though he has repeatedly asked and called for same.

10 That they have refused to give estimates of the work as provided for by the contract, only furnishing a part of same. That they refused to furnish any estimate of work and labor done by complainant from the 15th day of November, 1911, until the 29th day of February, 1912, when a purported statement was given, which attempted to ignore and set at naught all previous estimates. This latter statement was only partial and not correct.

That they have repeatedly discharged their engineers. He has repeatedly called for estimates as provided by the contract, but as before stated his requests and demands have been refused and declined. He further states that the Construction Company time and time again has changed the mode of work and required complainant to do work on this changed plan, notably, on an opening about 6¾ miles of Dyersburg where he was first ordered to fill the same and when he commenced was then ordered to drive or pile same and then to fill and then notified not to do it at all.

That one of the engines having gotten out of repairs he turned same over to the Construction Company under an agreement that it would have it repaired and return it to complainant and he would pay for same. That it has been repaired and he has offered to pay for the repairs but the Construction Company has refused to return it but it is now using it on the road or has turned it over to the Birmingham and Northwestern Railway Company to use in hauling freight and passengers on the railroad.

That a few days ago an accident having occurred on the railway, at the request of the Construction Company and said Hall, he turned the other engine to it for a day or two with the promise to re-

11 turn it to him, but they have refused and declined to return the engine, but have both of them and has declined to return either or permit complainant to have either of *that*. That it was absolutely necessary for him to have both of said engines in the performance of his work and could not proceed without them.

Complainant would charge that the said defendants have damaged him greatly by the refusal to deliver material, acquire rights of way and otherwise, both before the 14th of November, 1911, and since, in any amount of about $55,000.00; for work and labor performed in an amount of about $60,000.00. Also that he is entitled to recover the profits he would have made had he been allowed to finish

the work which would be on the unfinished work about the sum of $2,000.00.

Sixth.

Complainant would charge that the defendants have thrown as many obstacles as possible in his way in the performance of his contract, seeking to embarrass him, but refused to give estimates, and make payments as agreed to and thereby prevent him from meeting his obligations promptly.

That the defendants and especially the Construction Company and R. M. Hall have refused to give estimates or pay him as provided by the contracts, though repeatedly requested by him to do so, and his stating to them his condition and obligations to persons working for him, though they were largely indebted to him for work done on and about said railway, the defendants refused to pay him any more money unless he would sign the following receipt, proposed by said R. M. Hall for said Jackson Construction Company, to
12 wit:

"In consideration of the payment of Fifteen Thousand ($15,000.00) Dollars, account of building railroad from Jackson to Dyersburg, I, J. W. Wright, Jr., agree that I will hold the Jackson Construction Company, the Birmingham and North-western Railway Company and R. M. Hall, harmless and free from all liability from any claims, contracted by me with sub-contrators, and second,

I agree that I will ask no additional payment on account of building said railroad until the completion of my contract.

Witness my hand and seal the — day of December 1911"

Complainant charges that at the date *and* signing of said papers the Jackson Construction Company and R. M. Hall were indebted to him in an amount largely in excess of the $15,000.00 which was justly due and owing then. That he has already given said Construction Company a bond in the sum of $20,000.00 as set out in the seventh clause of the amended contract which fully covered all claims of material and labor and demands to any one contracted by him.

He charges that there was no consideration whatever for *a* said receipt but was forced from him by the repeated refusal of defendants to pay him what was justly due and he being without funds to proceed had to sign said paper. It is of no binding force whatever and he is not bound by same, not only for the reasons above given but also for the reason that defendants have and continually since said date breached the contract and prohibited and prevented complainant from completing the work as contemplated.

13 Seventh.

Complainant would further state unto your Honor that he has been forced to quit work because of the continuous breach of the contract by the defendants and especially the defendants the Jackson

Construction Company and R. M. Hall, in refusing to furnish material as contracted.

In refusing to furnish estimates of work as contracted.

In refusing to furnish the two engines or either of them.

In refusing to return the two engines or either of them.

In taking the flat cars from him and preventing him use of the same.

In obstructing his work and in refusing to pay him as contracted.

In ordering him to stop work and move off of the right-of-way.

In failing and refusing to bridge or fill 175 foot opening about 6¾ miles southeast of Dyersburg on line of defendants' road, as defendants agreed to do and thereby absolutely stopping all laying of tract at that point.

And many other wrongs.

Eighth.

Complainant would charge that he has repeatedly called the defendants' attention to the many breaches of their contract and they have refused to rectify or remedy or comply with the contracts. That the breaches becoming so flagrant, on February 29th, 1912, he wrote the defendant, Construction Company, calling its attention to the many breaches and notifying it of his claim for about $50,000.00 for work and labor done and performed under the contract. Also a claim for about $50,000.00 for damages for the various breaches of
14 the contract.

A copy of this letter was sent also to the other defendants. A copy of same is filed as exhibit Three to this bill and asked to be taken as a part of it, but not to be copied unless called for.

That on the 14th day of March, 1912, complainant gave, in writing, notice to the defendants, the Birmingham and Northwestern Railway Company, specifying in said notice the character of the work and labor done and services rendered and material furnished and the value thereof. A copy of this notice is here filed as Exhibit Four to this bill and asked to be taken as a part of it but not to be copied unless called for.

Complainant also filed as exhibit Five to this bill and asks that same be taken as a part of same, but not to be copied unless called for, an itemized statement of his claim for work and labor done and services performed and the value of same in the construction of said railway, which amounts to the sum of $59,029.84, instead of $51,000.00 as set out in exhibit Four. The latter Exhibit Five, being the correct amount due for work and labor and services performed.

Ninth.

Complainant would further charge that the defendants, and especially the defendants, Jackson Construction Company and R. M. Hall, are justly indebted to him in the sum of $59,029.84 for work and labor and services, etc., performed in the construction of the Bir-

mingham and Northwehtery Railway. And that said Railway Company is also indebted to him for said amount, as set out in exhibits Four and Five.

15 That they are also justly indebted to him in the further sum of $51,200.00 for damages as set out in exhibits Three and Four. The items of damages and amounts being specifically set out in same to which reference is had.

—.

Complainant charges that he has a lien on said Railway, its tracks, rails, bridges, switches, terminals, franchises, and cars, as provided by Statute and especially by Shannon's Code, Sections 3570 et seq. and also by Shannon's Code Sections 3580 et seq., for the work and labor and services performed and also for the damages.

If he is not entitled to this lien for the damages he is entitled to a judgment against the Construction Company and R. M. Hall as surety. He asks that a lien be declared on said Railway for his claim. He would state that it is less than ninety days since the work and labor he has done, and services performed and materials furnished by him in said work and that said notices were given within said ninety days of the work and labor done and services performed and completion of same, but also of date of material furnished.

Eleventh.

Complainants would charge that defendants are justly indebted to him for said before mentioned items by reason of breach of the contracts and that he is entitled to a lien on the railway and its properties as prescribed by statute for same.

But if he should be mistaken in this, he charges that he performed the work and labor as set out in said exhibits in and about the construction of said railway and that the defendants have the

16 fruits of his labor and are enjoying same and especially the Birmingham and Northwestern Railway Company and that the prices set out are reasonable and that the amounts are justly due and owing and unpaid and that he is entitled to recover on assumpsit or quantum meruit for work and labor and services performed and a lien on said railway properties to pay same.

That the Birmingham and Northwestern Railway Company is now using said railway built and constructed by complainant as far as Friendship, Tennessee, and is now enjoying the fruits and benefits of his labor without paying for same.

Twelfth.

Complainant would state that he has made the Jackson Construction Company and R. M. Hall parties in order that his claims may be adjudicated and that his lien may be declared and enforced on said railway and its property and same be sold to pay same.

He charges from information and belief that the Jackson Construction Company is insolvent and has no property to pay its debts.

He further charges from information and belief that the Birmingham and Northwestern Railway Company is also insolvent and that its assets will not near pay its liabilities, and that a Receiver should be appointed for both of said corporations to take charge of their properties and administer it for the payment of complainant's claims.

17 Prayer.

Complainant prays that the parties named as defendants be made such by proper process returnable to a near rule day.

That they answer fully but not on oath, the oath being expressly waived.

That a decree be had against each of the defendants and especially the Jackson Construction Company and R. M. Hall for complainant's claims of $110,229.84 and interest and such other claims as he has.

That a lien be declared on the Birmingham and Northwestern Railway Company and its property and especially on its line of Railway of 100 feet wide from Jackson, Tennessee, in a Northwesternly direction to Dyersburg, Tennessee, through Madison, Crockett and Dyer Counties, and its railroad track, ties, rails, tanks, bridges, switches and terminals and franchises for the claim of $110,229.84 or so much thereof as the Court should deem proper.

That said railroad and its properties aforesaid be sold to pay same and that the sale be made on not less than six months nor more than two years to bar redemption and when sale is made it be made without redemptions.

That a receiver be appointed to take charge of the properties and assets of said two corporations and the same administered to pay complainant's debts.

That all reasonable attorneys' fees be declared a part of the liabilities and a decree for same.

That he have all other, and further relief that the facts will justify and entitle him to.

That an attachment be granted and issue attaching said railway and Construction Company's property and same be sold for complainant's debt.

18 That an injunction be granted and issued enjoining each of the defendants from selling or transferring their property.

That any and all decrees be had in complainant's favor and against the defendants as may seem just and right to the Court.

That a decree be had not only for the value of the work and labor done and services performed, but also for the profits he would have made on the work uncompleted.

That he have any and all other relief the facts may justify.

This is the first application for a receiver, attachment, or injunction in this case.

BOND & BOND,
C. E. PIGFORD,
Solicitors for Complainant.

STATE OF TENNESSEE,
County of Madison:

Personally appeared, J. W. Wright, Jr., the complainant in the foregoing bill and made oath in due form of law and states that the allegations in the foregoing bill made of his own knowledge are true and those made on information and belief he believes to be true.

J. W. WRIGHT, JR.

Sworn to and subscribed before me, this the 19th day of March, 1912.

W. N. KEY, *D. C. & M.*

19 *Exhibit No. 1 to Original Bill.*

Filed March 19, 1912.

This agreement made this the 13th day of April, in the year One Thousand Nine Hundred and Eleven, by and between J. W. Wright Jr. party of the first part (hereinafter designated the contractor) and Jackson Construction Company, a corporation under the laws of the State of Tennessee, with its situs in Madison County, Tennessee, party of the second part (hereinafter referred to as Company) Witnesseth:

That the Contractor in consideration of the payments and covenants hereinafter mentioned to be made and performed by Company, agrees with the said company as follows:

Article I. The Contractor shall and will provide all equipment and perform all work for the completion of the constructing and building of the railroad from Jackson, Tennessee, to Dyersburg, Tennessee, in accordance with specifications herewith, which become hereby a part of this contract.

Article II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the Chief Engineer of said Company, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations — may be necessary to detail and illustrate the work to be done are to be furnished by said Engineer, and that the Contractor agrees to conform to and abide by the same so far as they may be consistent with the purpose referred to in Article I.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the
20 purpose of this contract by the said engineer are and remain the property of the Company.

Article III. No alterations shall be made in the work as designated except upon the written order of the engineer, the amount to be paid by the Company or allowed by the Contractor by virtue of such alterations will be stated in said order. Should the Company and the Contractor not agree as to the amount to be paid or allowed,

the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be settled by arbitration by three persons: The Company to select one, the Contractor one, and these two the third.

Article IV. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Engineer or his authorized representatives. The Contractor shall, within twenty-four hours after receiving written notice from the Engineer to that effect, proceed to remove from the grounds or structures all material condemned by the engineer or his authorized agents, whether worked or unworked, and to take down all portions of the work which the engineer shall by written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby, at his own expense.

The Contractor agrees to keep a competent man on the work at all times during working hours, authorized to receive and carry out the instructions of the engineer.

The different branches of work under this contract are intended to be, and are included in one contract, with the Contractor
21 solely responsible for all work and men employed. The Contractor shall not assign this contract, nor sublet or transfer the whole or any part or parts of this work under it, to any other persons or corporation (except for the delivery of materials) without the consent of the engineer, in writing, but will give personal attention and superintendence to the work, and the Contractor will not be released or discharged from any responsibility or liabilities under this contract owing to such assignees, sub-contractors, or their agents, employes or servants being allowed to engage in the work now under this contract.

Article V. The Company reserves the right to suspend, operation on the work under the contract, or on any particular part or parts, giving the Contractor twenty (20) days' notice, and in the event of such right being exercised, the engineer shall grant to the contractor an extension of time equal to the time of the suspension of the work. It is further understood and agreed, that, on such suspension, the contractor may have the option to close and settle up for the work done, according to the estimate of the said engineer; such suspension or settlement of the work, however, shall not entitle the Contractor to any claim for damages; or, if the Company shall postpone or suspend the work under this contract indefinitely, or altogether, which it reserves the right to do, then in that case, the engineer shall prepare a final estimate of the value of the part of the work done, such estimate to include all materials purchased or delivered to the Contractor, or specially designed and ordered for the work under this contract, the same as if the work had been completed, and this contract shall thereupon be terminated. All materials paid for and included in such final estimate that are not on the property of the Company shall be delivered to the company before such estimate is made. The
22 canceling of this contract shall not entitle the contractor to any claim for damages for anticipated profits on it.

In case the Contractor shall become financially embarrassed or refuse, or be unable to prosecute the work diligently, or fail to pay promptly bills for wages incurred for the work, or any one or more of the joint contractors shall become a bankrupt or make a general assignment for the benefit of creditors, or if the property of any such contractor or contractors shall be levied upon or taken in execution or under attachment, or by any judicial process whatsoever, or if, by reason of insolvency or bankruptcy, he or they shall be unable to fulfill the covenants herein contained, fully and effectively, according to the true intent and spirit thereof, the engineer, at his discretion, acting for the company, may at any time declare this contract or any portion or section in it terminated.

Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of material of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect, or failure being certified by the engineer, the Company shall be at liberty after twenty (20) days' written notice to the contractor, to provide any such labor or materials and deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract.

In case the work under this contract shall be assumed by the company, as provided above, the engineer shall have the authority and right, at his discretion, to take possession for the company and make use of the plant, and of any or all construction material, both such as enter into the complete work, and such as are required during
23 the construction, delivered by the Contractor at the site or in the vicinity of the work.

The fair value of all such materials as enter into the work so taken to be established by the engineer, and such value, less any previous payments made for such materials, shall be allowed and paid to the contractor in the final estimate or settlement of his accounts as for so much work done under his contract.

Article VI. The contractor agrees to begin and to prosecute the work covered by this agreement in the manner stipulated in the specifications and with the forces therein set forth, and to complete the work in six (6) months from this date; but the company is to furnish all material on the ground when called for by the contractor after twenty (20) days' notice, and delays caused by the company to be deducted from the said period of six months in which the work is to be completed; that is, the time for the completion of said work is to be extended to the extent of any delays caused wholly by the fault of the company.

Article VII. It is further agreed that with reference to rails and all such materials as may be delivered on the cars at Dyersburg or Jackson, upon notice to the contractor of the delivery of such material at either of said places, the contractor shall thereafter be liable for all charges and expense of unloading, hauling, storage, and demurrage incurred or accruing relative thereto.

Any person in the employ of the contractor or of any sub-contractor, who shall, in the opinion of the chief engineer, execute his

work in an unfaithful of unskilled manner, or prove disrespectful or riotous in his conduct, shall forthwith, at the direction of the chief engineer, be discharged.

24 Article VIII. It is expressly understood and agreed that the Contractor shall provide outfits, forces and equipment for the prosecution of the work covered by this contract in accordance with the requirements specified in the specifications, and that he shall maintain the said forces, outfits, and equipments continuously on the work until its final completion. If the said outfits, or any of them, should be delayed in starting to work after having reached the site of the work, by failure of the company to provide right of way, it is understood and agreed that the company shall pay to the said contractor the expenses of maintaining the said outfits until such time as said right of way shall have been provided.

Should the contractor be delayed in the prosecution of the work by acts of his employes, or by strikes caused by his employes, or by any damage caused by fire, lightening, earthquake, cyclone, or any other casualty, for which the company is not responsible, then and in that case the contractor shall have no right of claim against the said company, but the expense of the said delay shall be at the sole risk of said contractor.

Article IX. It is definitely understood and agreed that the chief engineer of the company shall have the right to *instruct* the order in which the work shall be done and to direct which portions of the work must be covered first.

Article X. It is hereby mutually agreed between the parties hereto that the amounts to be paid by the company to the contractor for the work covered by this contract shall be at the following rates:

25 For Clearing, $35.00 per acre,
For Grubbing, 3.00 per station,

Grading for earthwork and all other material without classification, including 500 feet free haul, 19½ cents per cubic yard:

For over-haul, 1¾ cents for each cubic yard and each 100 feet hauled beyond 500 feet:

For bridging, for driving and cut off piles in pile and tressel bridges under cap, 27½ cents per lineal foot;

For laying 24 inch drain pipe, 45 cents per lineal foot;

For hauling 24 " drain pile, 65 cents per ton per mile;

For timber in place $11.00 per B. M.;

For track laying $625.00 per mile;

For laying crossings, $35.00 per crossings;

For laying frogs, including switch connections, $50.00 per frog;

For building wings and laying cattle guards $10.00 per guard;

For excavating and water for foundation — per cubic yard;

Subject to additions and deductions as hereinbefore provided and that such amounts shall be paid by the Company to the Contractor.

On or about the first day of each month, during the progress of this work, an estimate shall be made by the engineer of the value of the work done up to such time, and upon his certificate of the amount being presented to the proper officials of the company, or such disbursing agent as the company may appoint, the amount of

said estimate, less a retained ten per cent. and less previous payments, shall be paid to the contractor on or before the 20th
26 day of each month for the work done in the previous months, at the nearest disbursing point of the company to the contractor's office.

If demanded by the engineer, said contractor shall furnish to the said Company or engineer receipts, vouchers, affidavits, schedules, or permits, etc., required by the State and municipal laws and ordinances; or if at any time there shall be evidence of any liens or claims for which, if established, the company might become liable, and which is chargeable to the contractor, the company shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to completely indemnify the company against such liens or claims.

The final payment shall be made subject to release after the completion and acceptance of the work included in this contract. The Contractor shall furnish to the company or the engineer, if deemed necessary by the engineer, all releases or waivers of liens, claims or right of claims of said contractor, and of sub-contractor and of all persons furnishing materials or labor thereunder, who might have a lien therefor. Should there prove to be any such claim after the final payment is made, the contractor shall refund to the company all moneys that the latter may be compelled to pay in discharging any lien or claim on said premises arising from work done on property, or material furnished hereunder, the contractor to refund such amounts to the company before the bond covering the work is declared released.

It is further mutually agreed between the parties hereto that no estimates given or payments made under this contract except the final certificate or final payment shall be conclusive evidence of the performance of this contract, either wholly or in part, and that
27 no payment shall be construed to be an acceptance of defective work or improper material.

Article XI. Wherever in this contract the terms "contractor" is used, it represents the party of the first part to this agreement; and the term "company" represents the party of the second part.

Wherever in this contract the term "engineer" is used it is understood (unless otherwise specified) to mean the chief engineer of the company or his duly authorized agents, limited by the particular duties entrusted to them.

Article XII. The Contractor shall supply the company with a good and sufficient bond acceptable to the company, to the amount of Fifty Thousand Dollars for the faithful carrying out and completion of his contract, including the clause stipulating the number of teams, etc., to be brought to the work, and the dates on which they are to be brought and the bond shall remain in force until 90 days after the final payment is due.

Article XIII. The contractor assumes all responsibility for any loss or damage that may happen to said work or to the materials therefor, or for any injury to the workmen or to the public, or to any individual, or for any damage to the company or other parties, adjoin-

ing properties, and in case of accident and suit occurring on same, he is to defend the suit in person and relieve the company from all cost and expenses and pay any judgment that may be recovered therein.

It is further agreed that the company shall not in any manner be answerable or accountable for any violation of state or municipal laws *of* ordinances as far as they may be applicable to the carrying out of the work. The Contractor shall indemnify the com-
28 pany against any such loss or damage or consequences of violation of any such laws or ordinances. This article, however shall not be construed as requiring the contractor to remove slides or to replace washed material due to freshets at its own cost.

Article XV. The said parties, for themselves, their heirs, executors, administrators, assigns, and successors, do hereby agree to the full performance of the covenants herein contained.

In witness Whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

JACKSON CONSTRUCTION COMPANY,
By R. M. HALL, *Pt.*
R. M. HALL.
J. W. WRIGHT, JR.

Signed, sealed and delivered in the presence of:
MIKE HARVEY.
C. J. PARAMORE.

29 *Specifications for Grading, etc.*

1. Under the head of grading shall be included all excavations and embankments for the formation of the roadbed for single track, and all necessary turnouts and side tracks; also the preparations for all such depot grounds, sites for water stations, etc., as shall be required by the said Chief Engineer. The digging of all ditches, changing the direction of streams and water courses, cutting down or raising any highways or private way, excavations and embankments in any way connected with, or incident to the construction of the railroad.

2. The contractor shall be responsible for the preservations of all stakes set.

3. As far as may be reasonably possible, the embankments shall be constructed with material taken from the excavations. The Contractor shall be required to dispose of his material in accordance with the directions of the Chief Engineer. Earth excavations shall be hauled five hundred feet where directed by the Chief Engineer, without extra compensation. Payment will be made for each cubic yard hauled beyond five hundred feet, for each one hundred feet of overhaul.

4. In filling over culverts and backing up masonry, great care should be taken to avoid disturbing the same. Only the best material

procurable in the neighborhood shall be used, and in filling over culverts the embankment shall be carried up in layers of uniform depth, so as to give as uniform pressure as possible on the culvert.

5. Extra land necessary for borrow pits and waste banks shall be purchased by second party.

6. All material shall be measured and paid for in excavation, except where borrow pits are taken out in such shapes as in the
30 judgment of the chief engineer, renders accurate measurements impracticable, in which case the borrowed material may be measured in embankment.

7. Excavations shall be taken out with fourteen (14) foot base and slopes of one to one, except where otherwise instructed or agreed by the chief engineer.

8. Embankments shall have twelve foot crown and one and a half to one slope except where otherwise instructed or agreed by the chief engineer.

9. When excavations are wasted or put in spoil banks, it shall not be deposited nearer than 10 feet to the slope staked unless by written permission of the said chief engineer.

10. When directed by the chief engineer of the company, excavations shall be hauled to such distance as he may direct.

11. All excavations shall be taken out of the frame to true measured prism, i. e., no projection will be allowed beyond the true plane of the slopes toward the center line. Material from slides, however, shall be measured and paid for.

12. Ditches. In Excavations, a ditch on each side shall be made two (2) feet wide on top.

13. All ditches must be at least one (1′) foot deep.

14. Solid rock excavations will be taken out one (1′) foot below grade and filled in again to the true grade line with such material other than crushed rock, as the chief engineer may select for roadbed within five hundred (500′) feet.

15. Embankment. When necessary, in the judgment of the Chief Engineer, all earth shall be borrowed on one side of the roadbed or the width of the berme be increased, free of extra charge, unless the work be done with "graders" or by other means which would render the requirements an unnecessary hardship in the judgment of the chief engineer.

31 16. As far as possible embankments shall be started at the base of the full width indicated by the slope stakes and build to the true slope, without widening with loose material from the top.

17. Ditches. All ditches, such as track ditches, surface ditches, drainage ditches of all kinds, and changes of channels shall be excavated as ordered under the directions of the Chief Engineer and without extra charge over contract, price and shall be considered as a part of the roadway at the point or opposite to the — where the work is done, and shall be deposited in embankment.

18. Classification: There shall be no classification of material of any kind.

19. Measurements will be made by the cubic yard of 27 cu. ft. from true measured prisms indicated by the cross section notes or

slope stakes of engineer. When measurement is made on embankment a fair and equitable deduction for shrinkage will be made in making estimates.

20. Clearing: The right of way shall be cleared for at least fifty (50) feet each side of the center line, or if the chief engineer shall so direct the full width of the right of way. All trees, stumps, undergrowth, and brush within such clearing must be cut so the tops of same shall not be over twelve (12) inches above surface of the ground.

21. All remaining trees, brush, logs, or other perishable materials, if not the property of adjoining land owner shall be cut, piled or burned, or otherwise disposed of from off the right of way. If the said trees, logs, and other material are the property of adjoining landowners, they shall be burned, removed, or otherwise disposed of, as directed by the chief engineer.

22. No allowance will be made for cutting and removal of
32 grain, grass, weeds, or other annual plants on right of way, the contract price of grading being assumed and understood to cover such items.

23. Grubbing and clearing will be considered as one item, and paid for by the acre actually cleared.

24. Grubbing. All roots, stumps, and grubs, must be removed as ordered by the chief engineer.

25. Generally grubbing will be done in excavations under embankments two (2) feet or less in height, where grubbing is necessary, and wherever else the chief engineer may direct.

26. The contractor must undertake to provide outfits, forces and equipment equivalent to the following schedule:

On or before April 22nd, 1911, not less than twenty teams or equivalent thereof:

On or before May 10th, 1911, not less than thirty teams additional or an equivalent thereof; which said forces he must agree to maintain continuously at all times on the work covered by these specifications, until completion of the said work.

Nothing in this paragraph, however, shall be construed as prohibiting the contractor from putting said forces, or any of them on the work at earlier date than those hereinabove set forth.

While it is estimated that the work may be fully completed with these forces by the expiration of six months from date hereof, it is understood in advance that the maintenance of the forces is the ruling feature in the completion of the work whether the said completion be at an earlier or later date than above mentioned. The above figures have been *de*rived at on the assumption that there will be approximately 450,000 cubic yards to handle. Should the quantity be found less when the location profiles are completed a pro-
33 portional reduction in total number of teams will be permitted.

27. Free transportation will be provided over the lines of the railroad Company's road for men and material destined for the work herein covered.

28. Track laying. Track to be layed with — pound — rail, full

tied, bolted and spiked with 2640 ties per mile, together with such switches and sidings and railroad crossings as may be determined upon. Track to be brought to a perfect line in accordance with centers as given by the engineer. Ties to be brought to a perfect line on the line side (south side) on tangents and on curves the line shall be transferred to outer side of curve. All ties shall be accurately spaced and at right angles to rail. Elevation of outer rail on curves shall be as directed by the engineer.

29. Surfacing. Surfacing shall consist in each tie being thoroughly tamped from end of tie to a point one foot on inside of rail, the centers being slightly tamped or shuffled. Track to be brought to a perfect surface as per final grade line established by the engineer, and indicated by grade stakes set at intervals of 100 feet. The raise in no place shall exceed six tenths of a foot. The track shall be ballasted with earth obtained from cut ditches and excavations or by widening cuts. In no case shall the contractor be allowed to "rob" or take material from the crown of the embankment or from berms. The contractor shall be required to furnish steel shims for expansion of such thickness as the engineer may direct from time to time.

Track to be dressed in accordance with diagram furnished
34 *furnished* by the engineer. All cut ditches shall be left in uniform condition free from holes so that drainage shall not be impaired. It is the intention of the above specifications to obtain a first-class track in every particular, both as to surface and alignment.

MIKE HARVEY,
Chief Engineer.

35 *Exhibit No. 2 to Original Bill.*

Filed March 19th, 1912.

This supplemental and amended agreement entered into this day by and between J. W. Wright, Jr., party of the first part, herein designated Contractor, and the Jackson Construction Company, a corporation organized under the laws of the State of Tennessee, party of the second part, herein referred to as the Company, Witnesseth:

Whereas, the parties hereto, heretofore, to wit, on or about the 13th day of April, 1911, entered into a contract for the purpose of building and constructing a railroad from Jackson Tennessee to Dyersburg, said state, which said contract is in writing and reference to which contract, together with the specifications therein referred to and made a part thereof, is hereby made for particulars, and

Whereas, by virtue of said contract and specifications thereto, the Contractor was to receive Six Hundred and Twenty-five ($625.00) per mile for the unloading, hauling and laying of track in accordance with said contract and specifications; and

Whereas, under and by virtue of said contract and specifications the contractor is obligated to surface said track and railroad in accordance with paragraph 29 of said specifications as a part of the construction and completion of said work; and

Whereas, the said contractor now contends that on account of alleged delay and the necessity of his having to haul and transport the rail and other material a greater distance than he anticipated, that the further performance of said contract will result in a loss to him, and he having demanded certain modifications of said original contract as a condition of his continuing the performance of the same; now

Therefore, the said original contract entered into between the parties as of date, about April 13, 1911, *in* hereby modified
36 and amended in the following particulars, to wit:

(1) The Company agrees to release the contractor from the final surfacing of the track as required by said contract and specifications of said railroad, from the town of Bells to Dyersburg, Tennessee.

(2) In consideration of being released from such final surfacing said track of said railroad from the town of Bells, to Dyersburg, Tennessee, the contractor agrees and obligates himself to load and unload and haul and deliver at his own expense all rails, ties, and other material for the track laying, and to lay the track and rail in accordance with the provisions of said contract and specifications for the sum of Five Hundred Fifty ($550.00) Dollars per mile, instead of Six Hundred Twenty-five ($625.00) Dollars per mile as provided in said original contract; the contractor agreeing to receive, take up and haul without additional charge to the company, all ties, which are now or may be delivered or piled on or near the railroad right of way; the said track to be laid with the rails already furnished and delivered to the contractor by the company and the track to be fully bolted, tied and spiked with 2640 ties per mile (ties to be uniform distance apart), together with such switches and sidings and railroad crossings as may be decided upon; the track to be brought to a perfect line in accordance with centers as given by the company's engineer; ties to be brought to a perfect line on the line side (south-side) or tangents, and on curves, the line shall be transferred to the outer side of curves; all ties shall be accurately spaced and to be at right angle with the rails. The elevation of the outer rail on curves shall be directed by the engineer. The said track shall be laid upon a hard smooth surface in accord-
ance with the grade line established by the engineer and in
37 such manner as to safely permit the operation of trains over and along said track from Bells to Dyersburg at a maximum speed of twenty (20) miles per hour, without injury to the rails or equipment, and in a manner satisfactory to the chief engineer of the company; the intention being to obtain a first class track in every particular with the exception of the final surfacing from which the contractor is released.

(3) The contractor agrees and obligates himself to lay the track on said line from Bells to Dyersburg, Tennessee, in accordance with the stipulations and specifications aforesaid and to have the same fully completed in accordance therewith on or before the expiration of sixty (60) working days from this date, and for each day's delay in the completion of said work on and after said time the contractor

agrees to pay the company the sum of One Hundred ($100.00) Dollars per day as liquidated damages, but the company agrees to furnish all material agreed by it to be furnished without delay to the contractor, and any delay caused the contractor by the failure of the company to furnish material shall not be counted a part of the time limit herein mentioned, nor shall any delays caused by washouts or excessive rains be accounted as a part of said period of time limit, and if the contractor shall be delayed on account of the failure by the company to furnish material, the company shall reimburse the contractor all expense caused by such delays.

(4) The contractor further agrees in consideration of the above modification, to waive and release all claims or demands he may have against the company on account of alleged delays and any and all claims he may now have or hereafter have against the company on account of extra work and services, except the sum of $2500.00, which sum is acknowledged by the contractor to be in full compromise settlement of any and all present and future claims of the contractor on account of extra work or services and force account.

38 (5) The Contractor further agrees that the Birmingham & Northwestern Railway Company may proceed to operate trains upon said railroad at its option, and that the operation of trains or cars upon and the use of said railroad and track prior to its final completion, shall not operate, or be deemed or claimed to operate as an acceptance of said work by either the Jackson Construction Company or said Railway Company, nor shall such operation or use have the effect of waiving any provisions of the contract between the parties hereto.

(6) This supplemental and amendatory agreement shall not affect obligation and duty of the contractor to *construction*, and complete the said railroad from the city of Jackson to the town of Bells in all respects as stipulated and required by said original contract and specifications thereto, except surfacing features, but this agreement is intended to effect only the track laying and surfacing features of said original contract.

(7) The contractor agrees to furnish bond in the sum of $20,000.00 condition- upon the faithful performance of said contract as hereby amended, and for the completion of the same by the time specified and to pay for all material and labor agreed to be furnished by the contractor, and to pay all demands for which the contractor may be liable because of delay or otherwise.

It is further understood and agreed that the Company is to allow the contractor the use of two locomotives and fifteen flat cars to be used in the hauling of rails and other material in the performance of said amended contract, the expense and cost of operating said locomotive- and cars and all repairs to same to be borne by and paid by the contractor; the contractor obligating himself to keep said locomotives and cars in repair and to return same in as good condition and repair as they are at present time or at date fur-

39 nished; the contractor further agrees to pay $1.00 per day for each of said locomotives until same are returned to the company.

As to estimates, payments, final acceptance of the work, in all other respects, the said original contract, as of date April 13th, 1911, shall remain in full force and effect, except as herein modified or amended.

In witness whereof the Contractor has hereunto subscribed his name and the company has caused its corporate name to be hereunto signed by its president, this the 14th day of November, 1911.

Signed in Triplicate.

J. W. WRIGHT, JR., *Contractor.*

JACKSON CONSTRUCTION COMPANY,

By R. M. HALL, *President.*

40 *Exhibit No. 3 A to Original Bill.*

Filed March 19, 1912.

Jackson, Tennessee, February 29, 1912.

Jackson Construction Company, Jackson, Tennessee.

GENTLEMEN: I write this letter for the purpose of again calling your attention to the many respects in which you have been and are breaching your contract with me. For the past several months you have only been furnishing me material sufficient to keep my forces busy for a small part of that time, although I have made almost daily calls on you in writing to furnish me said material. I have been and am now out of ties, bridge timber, spikes, cattle gap material etc. so that the work is practically at a standstill. There is one hundred and seventy-five foot opening just beyond the Forked Deer River which you sometimes since agreed to take care of, but the same has neither been bridged nor filled in, and my work is now blocked at that point. Even if I had material with which to proceed.

For a number of months I have been calling on you for an estimate of work done by me which you have failed to furnish without any excuse or reason whatever offered therefor. You owe me to this date for work and labor actually done and performed for you under the contract the sum of $50,000.00 or more and I demand of you that a certificate to that effect be furnished me as provided by the original contract.

I have heretofore several times called your attention to your failure to return to me the engine which I delivered to you sometime since for the purpose of having it repaired, which repairs you
41 agreed to have made. I have at all times been ready and willing to pay you the cost of said repairs upon said engine being returned to me, but you have failed and refused to return it to me although it has been repaired and is now in your service. I have been damaged in the sum of $2000.00 by reason of your refusal to return this engine to me promptly. The other engine which I have is now and has been for sometime past partially disabled and unfit for use on account of running into the switch your forces damaged

and failed to repair and notify me of as set out to you in my letter of February 22nd., 1912.

In addition to the foregoing you also owe me the following items of expense and damages, to wit:

Failure to furnish me established grade line	$3,000.00
Expenses of idle teams on account of having no ties to handle	2,500.00
Expenses of two engines and crews therefor and coal	4,000.00
Hauling ties, cleaning out sluffed in cuts and filling in washouts on fills	2,000.00
Right of way delays	10,000.00
Delay in furnishing steel, angle bars, bolts and spikes	2,000.00
Unloading and reloading rails	2,500.00
Delay in furnishing bridge material	4,000.00
Failure to furnish centers for track back lining	3,000.00
Loss on contract with Ingram & Hyman because of lack of material	1,000.00
Loss on contract with B. O. Watkins on pile driving and decking, because of failure to deliver material as called for	5,000.00
	48,000.00
42 Amount paid Engineering forces for obtaining estimates of work done which you failed and refused to furnish	$1,000.00

I furnish you the above figures for the purpose of showing you some of the items of loss and damages sustained by me but do not set out all of said damages and do not waive any other claims which I have against you by not specifying them at this time.

I also at this time and in this manner notify you that I claim my lien as a subcontractor for work and labor done, materials furnished and services rendered in building the Birmingham and Northwestern Railway against all the properties of said railway company. The character of work and labor so done and services rendered being, clearing and grubbing, grading, pile driving, framing and decking, trestles, track laying and surfacing, building cattle gaps and putting in road crossings and other work specified in my contracts with you, and my lien and charge therefor being the sum of $50,000.00 or more. I also claim my lien on said railway properties for the items of expense and damages above set out amounting to $51,000.00.

It is my purpose and desire to complete this road as I contracted to do and I will do so if you will furnish me the necessary material, etc., therefor as agreed, but I take this method of notifying you that unless the same is furnished me within ten (10) days from this date so that I can proceed with said work uninterruptedly and without further loss I will, at the expiration of that time, take such steps as I may deem necessary to protect my rights.

You can be governed accordingly.

Respectfully,

—— ——.

43 *Exhibit No. 3 "B" to Original Bill.*

Filed March 19, 1912.

Jackson, Tennessee, February 29, 1912.

Mr. R. M. Hall, Jackson, Tennessee.

DEAR SIR: I am herewith enclosing you a copy of letter this day written by me to the Jackson Construction Company wherein I specify the various amounts due me by it for work and labor done by me in building the Birmingham and Northwestern Railway and damages suffered as therein explained. I make said copy enclosed a part of this letter.

I take this method of notifying you that I claim my lien as a subcontractor for all of said matters against the assets, properties and franchises of the Birmingham & Northwestern Railway Company for the sum of $101,000.00.

Without waiving my lien against the properties, assets and franchises of the Birmingham and Northwestern Railway Company, I hereby further notify you, as guarantor under your written guarantee with me bearing date of April 17th, 1911 that I will hold your responsible and look to you also for the payment to me of said sum of $101,000.00 and any other damages which I may suffer or have suffered. I will also hold you liable for any breach of the contract of the said Jackson Construction Company with me the performance of which on the part of the Jackson Construction Company you guaranteed, in said paper bearing date of April 17th, 1911.

Respectfully,

—— ——.

44 *Exhibit No. 3 "C" to Original Bill.*

Filed March 19, 1912.

Jackson, Tennessee, February 29, 1912.

Birmingham & Northwestern Railway Company, c/o John L. Wisdom, President, Jackson, Tennessee.

GENTLEMEN: I am herewith enclosing you copy of letter this day written by me to the Jackson Construction Company wherein I specify the various amounts due me by it for work and labor done by me in building the Birmingham and Northwestern Railway and damages suffered as therein explained. I make said copy enclosed a part of this letter.

I take this method of notifying you that I claim my lien as a subcontractor for all of said matters against the assets, properties and franchises of the Birmingham and Northwestern Railway Company for the sum of $101,000.00.

Yours truly, —— ——.

45 *Exhibit No. 4 to Original Bill.*

Filed March 19, 1912.

Jackson, Tennessee, March 14, 1912.

To the Birmingham & Northwestern Railway Company, c/o John L. Wisdom, President, Jackson, Tennessee.

GENTLEMEN: You are hereby notified that, as subcontractor under the Jackson Construction Company, of Jackson, Tennessee, which has the contract to build your line of road, etc., that I claim my lien as a subcontractor on the right of way, roadbed, trackage, ties, rails, sidings, bridges, and culverts, rolling stock, equipment, building and franchises, of the Birmingham & Northwestern Railway Company, whose main line of road and right of way is about 100 feet wide and runs in a northwestwardly direction from Jackson Tennessee, to Dyersburg, Tennessee, through the counties of Madison, Crockett, and Dyer, and through the towns of Bells, Alamo, Crockett Mills and Friendship. My said lien as a subcontractor being for work and labor done, materials furnished and services rendered in building said railway and against all the properties of said railway company. The character of work and labor so done and services rendered being: Clearing and grubbing, grading its roadway, pile driving, framing and decking trestles, track laying and surfacing, building cattle gaps and culverts and putting in road crossings, and doing other work and rendering other services and furnishing other material in and about the construction of said road, my lien and charge therefor being the sum of $50,000.00 or more. I also claim my lien on said railroad properties for the following items of expense and damages, to wit:

Failure to furnish me established grade line....	$3,500.00
46 Expenses of idle teams on account of having no ties to handle	3,700.00
Expenses of two engines and crews therefor and coal..	4,000.00
Hauling ties, clearing out sluffed in cuts, and filling in washouts on fills.....	2,000.00
Right of way delays.....	10,000.00
Delaying in furnishing steel, angle bars, bolts and spikes	2,500.00
Unloading and reloading rails	2,500.00
Delay in furnishing bridge material.....	4,000.00
Failure to furnish centers for track, back lining.....	3,000.00
Loss on contract with Inman & Hyneman because of lack of material	10,000.00
Loss on contract with B. O. Watkins, on pile driving and decking because of failure to deliver material as called for	5,000.00
Amount paid engineering forces for obtaining estimates of work done which you failed and refused to furnish	1,000.00
	57,200.00

I furnish you the above figures for the purpose of showing you some of the items of expense, loss and damages sustained by me, but do not set out all of said matters and do not waive any other claims which I have by not specifying them at this time.

In claiming my lien as subcontractor as above set out against the assets and properties of the Birmingham and Northwestern Railway Company, I do not waive my claims against the Jackson
47 Construction Company for any of said matters, nor do I waive my claim against R. M. Hall, guarantor and surety of Jackson Construction Company for the fulfillment of its contract with me, but expressly reserve my rights against both of them.

Respectfully,

J. W. WRIGHT, JR.

The Birmingham & Northwestern Railway Company this day acknowledges receipt of a true and exact copy of the above and foregoing notice of lien and claim.

This March 14th, 1912.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY,
Per JNO. L. WISDOM, *President.*

48 *Exhibit No. 5 to Original Bill.*

Filed March 19th, 1912.

Amounts Due J. W. Wright, Jr., for Work and Labor Done on the B. & N. W. R. R.

Retainage.

Total Estimate	$147,709.88	
Retainage of 10% of estimate		$14,770.99
Less amount advanced on retainage		7,000.00
Balance due on retainage		7,770.99

(Track Work.)

Total track laid 43.05 miles at $550.00	$23,677.50
Plus 11 miles surface at $75.00 extra	825.00
Plus 12 switches at $50.00 ex	600.00
Plus 1 railroad crossing at $35.00	35.00
Track Work	$25,137.50
Less 15.86 miles paid for at $625.00	9,912.50
Balance due on track work	$15,222.00

Acknowledged force account			$2,500.00
Overhaul 57,466 yards at $.0175			1,005.65
Clearing 13.06 acres at $35.00			457.10
Grubbing 403 Sta. at $3.00			1,209.00
Piling—Linear Ft.—21,414 at $.275			5,889.12
Timber:			
In trestles	351,984		
In boxes	1,483		
In crossings	7,630		
Total timber	361,097	B. M. at $11.00	3,972.07
Pipe Laid:			
24"—957'			
18"— 9'			
12"— 58			
1024' at $.45			460.80
49			
Pipe hauled—118.04 tons at $.65			$76.72
Cattle Guards,—62 at $11.00			682.00
Additional force account of placing ties under track filling washouts, clearing out cuts, extra lining of track and extra work on bridges, as hauling material, etc			7,000.00
Earth cu. yds. 65,561 at $.195			12,782.39

Recapitulation.

Balance due on retainage	7,770.99
Balance due on Track work	15,222.00
Balance acknowledged force account	2,500.00
Balance due on overhaul	1,005.65
Balance due on clearing	457.10
Balance due on grubbing	1,209.00
Balance due on pile driving	5,889.12
Balance due on timber in place	3,972.07
Balance due on pipe laying	460.80
Balance due on pipe hauling	76.72
Balance due on cattle guards	682.00
Balance due additional force account	7,000.00
Total balance due for actual work	$46,245.45
Balance due earth cu. yds.	12,784.39
Total Balance due for actual work	$59,029.84

50 *Amended and Supplemental Bill.*

Filed March 22, 1912.

J. W. WRIGHT, JR.,

VS.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY et al.

Filed as an Injunction Bill March 30th, 1912.

To the Honorable E. L. Bullock, Chancellor of the Eighth Chancery Division, holding the Court at Jackson, Tennessee, for the County of Madison, State of Tennessee:

The Bill of complaint of J. W. Wright, Jr., a resident of the State of Alabama and a non-resident of the State of Tennessee, filed against Birmingham & Northwestern Railway, a corporation chartered and organized by and under the laws of the State of Tennessee and a resident of Jackson, Madison County, Tennessee; Jackson Construction Company, a corporation, chartered and organized by and under the laws of the State of Tennessee and a resident of Jackson, Madison County, Tennessee, and R. M. Hall, a resident of Dyer County, Tennessee; L. M. Williams, a resident of Dyer County, Tennessee; R. T. Sorrel, a resident of Dyer County, Tennessee; J. F. Cooley, a resident of Dyer County, Tennessee; Mit Dunagan and Cresap Brothers and Cates, residents of Gibson County, Tennessee; C. D. Murchison, a resident of Crockett County, Tennessee; J. A. Brittian, a resident of Madison County, Tennessee.

51 First.

Your complainant would most respectfully state and show unto your Honor on the 19th day of March 1912, he filed his original injunction and attachment bill in this Court against the defendants, Birmingham and Northwestern Railway Company, Jackson Construction Company and R. M. Hall, by and in which he seeks to recover the sum of about $110,000.00 for work and labor and material furnished and damages accruing to him in the construction as sub-contractor of the Jackson Construction Company, of the Birmingham & Northwestern Railway Company, in its line of railway from Jackson Tennessee, in a northwesterly direction to Dyersburg, Tennessee. About 59,000.00 of said claim being for work and labor and materials furnished by him as sub-contractor of said Jackson Construction Company in the building and construction of said railway.

For a full information as to the claims and character of the same and objects and purposes of said Bill your Complainant would respectfully refer to said original bill and ask that the same be taken

as a part of this Bill or Amended Bill and be considered as a part of same without again repeating in particular each item of his claim.

Second.

Complainant would respectfully state that the Birmingham and Northwestern Railway Company was on or about the — day of August 1910 chartered and organized by and under the laws of the state of Tennessee, the object and purposes of said incorporation, as specified by its charter, being for the purpose of constructing the railway from the City of Jackson in the County of Madison, in the state of Tennessee, running in a Northwesterly direction
52 through the county of Madison and Crockett to Dyersburg in Dyer County Tennessee. Said corporation has its chief offices at Jackson Tennessee where it is located. The defendant, Jackson Construction company was chartered in December 1910 as more fully set out in said original bill to which reference is had.

Third.

Complainant would state that under some agreement not fully known to him the Jackson Construction Company made some kind of a contract with the Birmingham & Northwestern Railway Company for the purpose of constructing its line of railway from Jackson Tennessee to Dyersburg, Tennessee, and that said Jackson Construction Company entered into an agreement with your complainant on or about the 13th day of April, 1911, by its President, R. M. Hall, contracted with your complainant for certain work, labor and services in the building and construction of said railway, the terms and conditions of said contract are more specifically set out in Exhibit "One" to said original bill to which reference is had. That complaintiff proceeded and did perform work and labor and services in the construction of said railway in the mode and manner as set out in said original bill.

That on the 14th of November, 1911, an amended or supplemental contract was entered into by and with said Construction Company, by its president, R. M. Hall, and Complainant. The terms of said amended agreement are fully set out in Exhibit 'Two' to said original bill.

The defendant, R. M. Hall, on the 17th of April 1911 contracted with your complainant and guaranteed the performance of
53 the contract on the part of the Jackson Construction Company. A copy of said guarantee is copied in said original bill to which reference is had.

Fourth.

Your complainant would further show and state unto Your Honor that there are a number of parties who have claims both against your Complainant and said Jackson Construction Company for work and labor done and material furnished in and about the construction

of said railway for work and labor and material also used in the construction of said railway.

Your complainant would further state that owing to the acts and conduct of the Birmingham and Northwestern Railway Company, Jackson Construction Company, and R. M. Hall, in refusing and failing to pay him the full amounts owing him for work and labor done in the construction of said railway and for damages to him as more specifically set out in said original bill and refusing to furnish him estimates of work in order that he might pay the sub-contractors or persons employed by him in assisting in the construction of said railway, he has been unable to ascertain properly their claim and make settlement with them for the amounts justly due them and has therefore made a number of them parties defendant in this cause that they may establish their rights and claims and liens and that they may be paid the just amounts due and owing them.

The defendant, L. M. Williams, has a claim for about $2,000.00 or $2,500.00, as sub-contractor under your Complainant, Wright, for damages and labor in part construction of said railway.

54 The defendant, J. T. Cooley, is claiming about $1,100.00 for work and labor done under your Complainant in part construction of said railway.

That in the construction of said railway it was necessary for your complainant to hire and employ men and material to assist in the construction of said railway and he did employ said Williams, Sorrel, and Cooley and perhaps there are some others not now remembered by complainant; that each and all of said parties named are claiming a lien upon the property of the said Birmingham & Northwestern Railway Company for work and labor done in the construction of said Railway.

That the defendant, Mit Dunagan, has a claim for about $1,800.00 or $1,900.00 against the Jackson Construction Company for materials furnished and used in the construction of said railway and claims a lien against the Birmingham & Northwestern Railway Company on its said line of railway and property for said materials furnished.

That the defendants, Cressaps Brothers & Cates, whose individual names and initials are not known to complainant, has a claim of $300.00 or $400.00 against your complainant for work and labor done in the construction of said railway and also about $250.00 against the Jackson Construction Company for work and labor performed for it in construction of said railway and is also claiming a lien on the railway and property of the Birmingham and Northwestern Railway Company for both of said claims for said work and labor done both for and under your complainant and the Jackson Construction Company.

That the defendant, J. A. Brittian, has a claim of about $1,400.00 against the Jackson Construction Company for materials fur-

55 nished by him to and for the Jackson Construction Company to be used and which was used in the construction of said railway and is claiming also a lien on said Birmingham and Northwestern Railway Company and its property for said amount.

That the defendant, C. D. Murchison, has a claim of $800.00 or

$900.00 for cross ties and other materials furnished the Jackson Construction Company and which was used in the construction of said Railway and is also claiming a lien on the property and railway of said Birmingham and Northwestern Railway Company.

Complainant would further state that there are a number of other persons who have claims against said railway company property for work and labor done and materials furnished in and about the construction of said railway and who, with the defendants above named, are entitled to a lien on said railway company's property and each and all of those before mentioned defendants are now threatening to bring suits unless restrained and all brought in this case and all matters be settled here.

Fifth.

Complainant would most respectfully state that from information and belief and from such he charges the fact to be that both the Birmingham and Northwestern Railway Company and the Jackson Construction Company are insolvent and unable to pay their debts. That said Birmingham & Northwestern Railway Company owns no property or assets except the line of railway and right-of-way from Jackson to Dyersburg, and that as appears from the record in this county said Railway Company in December 1911 executed and regis-
56 tered a mortgage or deed of trust on all of its line of railway, franchises and all of its assets for about $525,000.00 or $550,-000.00 and that said Jackson Construction Company purported to have purchased the cars which are running or being operated on said right-of-way and that they owe for the same and has also placed a mortgage or trust deed of record in Madison County Tennessee on said cars for the sum of over $10,000.00, the same being executed about the — day of ——, 1911. That neither of said company-s own any other property so far as Complainant has been able to ascertain, except said line of railway and a few interior cars which are not near worth the debts that are due and owing by said Railway and Construction Company or either of them.

That it is necessary that a Receiver should be appointed to take charge of said railway property and its assets and also the property of the Jackson Construction Company and administer it under the orders and decrees of this Court for the benefit of their creditors and especially the lien of creditors and complainant.

Sixth.

Complainant would further charge, from information and, belief that the revenues of said Railway Company are not sufficient to operate, maintain and keep up the same and that the Said Birmingham & Northwestern Railway Company is allowing and permitting said Railway line and property to go to waste, and that by this neglect and refusal and inability of said Railway Company to maintain and keep up its track and railway property that it cannot and will not be able to meet its liabilities.

57 Seventh.

Your complainant would ask and he does file this bill on behalf of himself and all other creditors of said Companies and asks that each, not only the defendants made parties, but each and all others who have claims either by liens or otherwise, be compelled to file their claims in this cause and let the same be properly adjudicated and paid.

He charges, from information and belief, that not only his claims but those others mentioned in the bill and a number of others are justly owing and past due, and said Birmingham and Northwestern Railway Company and Jackson Construction Company refuse to pay the same or to give any satisfaction whatever in reference to the matter and it is therefore necessary to resort to this Court in order that the creditors may be paid by proper decrees of the Court.

That as before mentioned and which he also stated and charges from information and belief, the information being from reliable sources, that said Jackson Construction Company is insolvent and never did have any property but was simply promoting scheme by said Hall in order to relieve the Birmingham & Northwestern Railway Company as a contractor and in order that the said R. M. Hall, being the chief owner and promotor of said corporation might be remunerated by both concerns.

That the Birmingham and Northwestern Railway Company, from information and belief, he charges, has no assets except its line of railway which was constructed and built by and with the labor and services of your Complainant and the men he had under him, and also it has a few cars of very little value heavily encumbered and that its property will not near pay its debts.

58 Eighth.

Complainant would charge that the men and especially the de*renfants* who are set out as having been employed by him and said railway company and others will also sue unless they are restrained and charges that the matters will be greatly complicated by a multiplicity of suits and it will be to the interest of all parties that they all be compelled to come into this suit or cause, and litigate their claims to the end that justice may be done.

A number of said defendants, creditors, are residents of other counties than Madison and perhaps some out of the State and they are threatening to sue and will do so unless restrained and be ordered to litigate this cause. That they will proceed to bring separate suits in Madison, Crockett and Dyer Counties and thereby embarrass the winding up and settlement of the claims. Such action will not only entail considerable cost but also would embarrass the proper settlement of the matters in litigation, as most, if not all of their claims, grow out of the construction of said railway.

Prayer.

Your Complainant would pray that this bill be filed as amended and supplemental bill to that he filed on the 19th of March 1912 in this cause and that it be considered a part of said bill and the allegations of this bill and the original bill be taken as a part of one and the same bill.

That he be allowed to file this as a general creditors' bill in behalf of himself and all other creditors of the said Birmingham
59 & Northwestern Railway Company and Jackson Construction Company and R. M. Hall and of your complainant and that the Bill as such be sustained by your Honor and that all orders and decrees to effectuate this end be made.

That all the parties named as defendants in the caption be made such by proper process issued returnable to a near Rule Day and that each be required to answer but the oath to the answer of each is expressly waived.

That all of the bona fide creditors and especially the lien creditors who have performed labor and furnished materials in the construction of said railway be required to prosecute their claims and demand in this Court and in this cause and to that end that they be allowed to — their petitions in term or in vacation, exhibiting their respective claims and demands and to prove the same. That they be granted all the benefits of this proceedings to which the complainant may be entitled. That is the lien creditors be paid first and the other creditors thereafter and that the Master be directed to notify, by publication, all the creditors of said Railway Company and Construction Company to file their claims in this cause.

That all proper judgments and decrees be had in Complainant's favor to establish his claims for damages and for work and labor and the same be declared a lien against said Railway property as more specifically and expressly set out in the original bill.

That a receiver be appointed to take into his possession all the property of the Birmingham and Northwestern Railway Company and of the Jackson Construction Company of every sort whatsoever and that such Receiver be empowered and directed to make such disposition of it as may to the Court seem proper either in operating the railway or in selling it.

60 That an attachment issue attaching the assets of said Railway Company and Construction Company and that all of the said property of each and both of said corporations be sold on a credit of not less than six months nor more than two years with the equity of redemption barred.

Than an injunction issue restraining said Railway Company and Jackson Construction Company and R. H. Hall from t-ansferring or disposing of any of their property of any kind until the final adjudication and settlement of all claims is had.

That after the assets have been collected and the money received that the proceeds thereof, after paying the costs and attorneys' fees for solicitors for the Complainant, that the same be distributed under

the orders of the Court as the Court may deem proper, the lien creditors being first paid and the other creditors thereafter.

Than an injunction issue restraining each and all of the defendants from instituting or prosecuting any suits either against your Complainant or the Birmingham & Northwestern Railway Company or Jackson Construction Company for any work done or materials furnished, damages incurred by and in and about the construction of said railway and that each and all creditors be compelled to litigate their claims in this cause in order to avoid numberless suits and costs of the same and wasting of assets of said Corporations.

He prays for any other and all relief that the facts may justify either under the original bill or under this supplemental or amended bill.

This is the first application for an attachment injunction or Receiver asked for in this cause.

BOND & BOND,
C. E. PIGFORD,
Solicitors for Complainant.

J. W. WRIGHT, JR.

61 STATE OF TENNESSEE,
County of Madison:

Personally appeared before me, J. W. Wright Jr., the Complainant in the foregoing Bill and made oath in due form of law that the allegations of said Bill which are made upon his own knowledge are true and those made upon information and belief he believes to be true.

J. W. WRIGHT.

Sworn to and subscribed before me this the 22nd day of March 1912.

W. N. KEY,
D. C. & M.

62 To R. A. Hurt, C. & M., Jackson, Tenn.:

Upon complainant *execution* injunction bond with good and solvent sureties, and properly conditioned as the law directs, and in the sum of $1,000.00, you will issue writ of injunction as prayed for *vesting* each and all the defendants mentioned as creditors and all other creditors whether mentioned in person or not or having liens for labor or materials furnished from instituting or prosecuting any suits either against the complainant or the Birmingham & Northwestern Railway Company or Jackson Construction Company, for work done or materials furnished or damages incurred in and about the construction of said railway.

All other matters mentioned in th prayer of the *will* are reversed for the action of the Chancellor.

This March 20th, 1912.

S. J. EVERETT, *Judge.*

63 *Second Amended and Supplemental Bill.*

Filed March 26, 1912.

J. W. WRIGHT, JR.,

vs.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY et al.

To the Honorable E. L. Bullock, Chancellor *or* the Eighth Chancery Division, holding the Court at Jackson, Tennessee, for Madison County, State of Tennessee:

The bill of complaint of J. W. Wright, Jr., a resident of the State of Alabama, and a non-resident of the State of Tennessee, filed against Birmingham & Northwestern Railway, a corporation chartered and organized by and under the laws of the State of Tennessee and a resident of Jackson, Madison County Tennessee; Jackson Construction Company, a corporation chartered by and under the laws of the State of Tennessee, and a resident of Jackson, Madison County Tennessee; R. M. Hall, a resident of Dyer County Tennessee; L. M. Williams, a resident of Dyer County, Tennessee; J. T. Cooley a resident of Dyer County Tennessee; R. T. Sorrel, a resident of Dyer County Tennessee; Mit Dunagan, and Cressap Brothers and Cates, residents of Gibson County Tennessee; C. D. Murchison, a resident of Crockett County Tennessee; J. A. Brittian, a resident of Madison County Tennessee; Union Bank and Trust Company, trustee, a corporation under the laws of Tennessee, a resident of Jackson, Madison County, Tennessee; Mercantile Trust Company, a corporation under the laws of the State of Tennessee and a resident of Jackson, Madison County, Tennessee:

64 First.

Your complainant would most respectfully state and show unto Your Honor that on the 19th of March 1912, he filed his original injunction and attachment bill in this Court against the defendants, the Birmingham & Northwestern Railway Company, Jackson Construction Company and R. M. Hall by and under which he sought to recover the sum of about $110,000.00 for work and labor and material furnished damages accruing to him in the construction as sub-contractor of the Jackson Construction Company, of the Birmingham and Northwestern Railway Company in its line of railway from Jackson, Tennessee, in a northwesterly direction to Dyersburg Tennessee. About $59,000.00 of said claim being for work and labor and materials furnished by him as sub-contractor of said Jackson Construction Company in the building and construction of said railway.

For a full information as to the claims and character of the same and objects and purposes of said bill your complainant would respect-

fully refer to said original bill and asks that the same be taken as a part of this bill or amended bill and be considered as a part of the same without again repeating in particular each item of his claim.

Second.

Complainant would most respectfully further show that on the 22nd of March, 19-2, he filed his amended and supplemental bill in this court and also filed it as a general creditors' bill, naming all the persons set out in the caption in this bill as defendants in said amended bill, except the Union Bank and Trust Company, trustee,
65 and the Mercantile Trust Company, which latter concerns are now asked to be made defendants in this cause, and in the original and amended and supplemental cause.

Third.

Your complainant would most respectfully ask that the original bill and the amended bill filed by him be taken as a part of this bill, and all of them consolidated and be considered as one cause, and that this bill may be considered as a part of and amendment to both the original and amended bill and heard as one cause and that the allegations and statements made both in the original and amended bill be taken as a part of this bill which complainant now adopts and charges.

Fourth.

Complainant would most respectfully state and charge that the Birmingham and Northwestern Railway Company was chartered about August 13th, 1910 for the purpose of constructing a railway line from Jackson or a point near Jackson, Tennessee, to a point at or near Dyersburg, in Dyer County Tennessee, the object and purpose of said incorporation being more specifically set out in said original bill.

The authorized capital stock of said corporation is $300,000.00.

That the Jackson Construction Company was chartered about December 23rd 1910 with an authorized capital stock of $5,000.00.

That the defendants, Mercantile Trust Company was chartered about March 21st, 1911, with an authorized capital stock of
66 $100,000.00.

From information and belief complainant charges that all three of said incorporations are organized and chartered for the purpose of constructing and building said railway and it was a promoting scheme by which a "take-off" would be had by each one of said corporations.

Fifth.

Your complainant would further state that in his original bill he set out and claimed that the Birmingham & Northwestern Railway Company and the Jackson Construction Company and R. M. Hall were justly indebted to him by debts past due in the sum of over

$110,000.00 for work and labor done in and about the construction of said railway and also for damages, which claim is more specifically set out in said original bill to which complainant now refers for particularity and asks that the same be taken as a part of this allegation.

Complainant would charge that said Birmingham and Northwestern Railway Company and said Jackson Construction Company and said R. M. Hall are justly indebted to him for said amounts above mentioned and that he has by virtue of the statutes a lien on the railway property of every kind and character, road bed, ties, rails, switches, franchise, and all of its other property from Jackson, Tennessee, to Dyersburg, Tennessee and more specifically set out in his original bill.

Sixth.

From information and belief complainant charges that the
67 Mercantile Trust Company was chartered under the banking laws of this State and for the purpose of assisting in the construction of said railway or as a means of making money out of said construction and that it has some agreement or contract with the Birmingham & Northwestern Railway Company or the Jackson Construction Company or both by which it is interested in some manner unknown to your complainant in and about said Railway Company and its bonds issued, and therefore it is made a party here in order that the facts may be developed and shown as to what interest it has.

Seventh.

Complainant would most respectfully further state that on or about the 12th of December, 1911, the Birmingham and Northwestern Railway Company filed and registered in the Register's office of Madison County Tennessee, a deed of trust by and which it conveyed all of its property of every kind and character to the Union Bank and Trust Company, Trustee, for the purpose more specifically set out hereafter.

That the conveyance conveys all the property, real, personal and mixed, together with the appurtenances thereto belonging and all rights of way, franchises, cross-ties, rails, section houses and all other property upon its line of railway from Jackson Tennessee to Dyersburg, Tennessee.

That in said trust deed it is recited that said Birmingham and Northwestern Railway Company had let the contract to the Jackson Construction Company to construct the railway from Jackson Tennessee to Dyersburg, Tennessee and that as a part of the contract with said Jackson Construction Company and part of the consideration for building — equip-ing said railroad, the railroad obligated
68 itself to issue and deliver to said Construction Company its 5% first mortgage bonds in an amount of $17,500.00 per miles of said railway constructed, including side tracks, switches and main line, the bonds to be issued and delivered from time to time as five miles of said road was completed.

And that upon the faith of said contract the Jackson Construction Company had entered upon, constructed and equipped said railroad and has already completed as contemplated by said contract a considerable part of said railroad and that there was then due said Jackson Construction Company for the part of said railroad and all of said bonds will soon become due and required and demanded under said contract.

It was then ordered that the Board of Directors issue bonds to the amount of $17,500.00 per miles of said railroad for the main line, etc., then constructed or which may hereafter be constructed, the principal amount not to exceed $875,000.00, in the sum of $1,000.00 each,—all to be dated December 1st, 1911 and payable twenty years with interest at 5% payable semi-annually on June 1st, and December 1st.

From information and belief complainant states and so charges that under said contract with said Construction Company there has been issued and delivered $875,000.00 of said authorized issue of bonds based upon the completion of the railway as contemplated by the contract.

That though the capital stock of said Jackson Construction Company was only $5,000.00, yet it appears that it undertook a contract of nearly One Million Dollars in constructing said railway, with no assets whatever so far as complainant can ascertain
69 except said authorized stock of $5,000.00, but whether that has ever been issued complainant is not informed.

Complainant has been informed and so states and charges that the defendant, R. M. Hall, is or claims to be the owner of all of said $875,000.00 of bonds which have been issued, but by what arrangements he has become the owner or possessor of said bonds complainant has been unable to learn.

Eighth.

This complainant would further state that this amendment is made for the purpose of bringing in this case said Mercantile Trust Company in order that it may show *by* what means or interest it has in the building of said road; of the issuance of said bonds *of* possession of them; that it was originally organized, as he has been informed, for the purpose of trying to finance the building of said road, although its capital stock was only $100,000.00 and evidently it relied upon the issuance of said bonds or the delivery of same to it under its contract.

The Union Bank and Trust Company as trustee is made a party to this suit because it appears that said Railway Company has undertaken to convey the legal title to all its property to the Union Bank and Trust Company as trustee and has thereby attempted to encumber and to cloud the title to the property and endanger complainant's lien rights and all others who have lien claims on said railway. He charges that by Section 3580 of Shannon's Code that said railway company had no power or authority to execute said mortgage or convey its property and defeat your complainant

and other lien hoiders in their liens and he therefore asks that said mortgage o rtrust be declared null and void and set aside or be subordinated to complainant's rights and other creditors'
70 rights as provided by statute and to this end all proper decrees be made in the premises.

Complainant is advised that it is proper that said trustee should be made a party in order that the rights of the parties may be declared and that in case of sale under this proceeding that the purchaser acquire a perfect title without any cloud hanging over same.

Said trust provides that in case of default of the payment of the semi-annual interest or default in the payment of the bonds, the trustee is authorized to sell said property.

Ninth.

From information and belief complainant charges that the Jackson Construction Company is insolvent; that its capital stock consisted of only $5,000.00; that it has contracted debts largely in excess of that sum, and in fact in Hundreds of Thousands of Dollars, and that it is now justly indebted to complainant in the sum of $110,000.00, or over and owing other parties.

From information and belief complainant further charges that the Birmingham & Northwestern Railway Company is insolvent; that its capital stock was only $300,000.00; and that its authorized bond issue was $875,000.00 and that it has already issued all of its bonds and that it is indebted to complainant in an amount over $110,000.00 and to other parties in large amounts, the exact amount complainant does not know.

That its indebtedness is One Million Dollars or more and its property is encumbered to this extent by reason of said deed of trust and said debts and lien debts before mentioned which amount to One Million Dollars or more and it is necessary in order that
71 the rights of the creditors be protected, that it be placed in the hands of a Receiver.

Prayer.

Complainant prays that the parties named as defendants and especially the two last named defendants be made parties to this bill and that process issue to the last two named defendants, Union Bank and Trust Company, Trustee, and Mercantile Trust Company, and that they be required to answer truly at the earliest practicable Rul Day but not on oath which — expressly waived.

That this bill be filed as an amendment or supplemental to the original and amended bill heretofore filed and consolidated with the same and that it also be filed as a general creditors' bill.

That all proper orders and decrees be had in the cause that will protect complainant's rights and other lien creditors or others who may be required or do come into this cause.

That complainant have a judgment against said Birmingham

& Northwestern Railway Company, Jackson Construction Company and R. M. Hall for the amount due him of about $110,000.00 or more as more specifically set out in his original bill.

That a lien be declared on all of said railway property as before set out and a decree be had in his favor declaring said lien and said property be sold on a credit of not less than six months to bar redemption.

That any and all creditors of said Jackson Construction Company or R. M. Hall or the Birmingham & Northewestern Railway
72 Company be ordered to file their claims in this cause and litigate the same there and any rights or liens they may have that the same may be established and that the proper decrees be had for same.

That any and all such creditors be enjoined from proceeding in any other court or in any other cause to enforce their claims or liens.

That an account be had showing said Mercantile Trust Company's connection with the building of said road. How much of its stock has been issued, what disposition has been had of it; what contract it had with the Jackson Construction Company, R. M. Hall or the Birmingham & Northwestern Railway Company relative to the building of said railway or the handling of said bonds.

That an account be had as to the nature and character of the contract of the Jackson Construction Company with R. M. Hall, Birmingham & Northwestern Railway Company, or the Mercantile Trust Company; how much of its stock has been issued; what was done with it; whether any or how much of said bonds have been issued to or received by it and what disposition it has done with the same.

That the Union Bank and Trust Company be required to show what has been the disposition of the bonds issued by said Railway Company and who now holds them.

That said R. M. Hall be required to show whether he is the holder, owner or possessor of any of said bonds,—if so how many, when and how received and the purposes thereof.

That the Birmingham and Northwestern Railway Company be required to show how many of said bonds have been issued, to whom and how held and the purpose the same are held.

73 That all proper accounts be had between the parties.

That a receiver be appointed to take over the property of said Birmingham and Northwestern Railway Company and Jackson Construction Company and be administered under the orders and decrees of this court for the benefit of the creditors.

That an attachment issue attaching the property of said Birmingham & Northwestern Railway Company.

That an injunction issue restraining said Birmingham and Northwestern Railway Company from disposing of any of its property and enjoining any and all persons or creditors of the Birmingham & Northwestern Railway Company and the Jackson Construction Company or R. M. Hall from prosecuting any suits relative to the building and construction of said Railway *of* the claims grow-

ing out of same and they be required to file the same in this Court for adjudication.

That all reasonable and proper attorneys' .fees be adjudicated for complainant's attorneys in these causes.

He prays for any and all other relief that the facts will entitle him to.

This is the first application for Receiver, attachment and injunction in this amended bill and is the first applied for in this cause, except the application as set out in the original and amended bill heretofore filed.

BOND & BOND,
C. E. PIGFORD,
Solicitors for Complainant.

J. W. WRIGHT, JR.

74 STATE OF TENNESSEE,
County of Madison:

Personally appeared before me, J. W. Wright, Jr., the complainant in the foregoing bill and made oath in due form of law that the allegations of said bill which are made upon his own knowledge are true and those made upon information and belief he believes to be true.

J. W. WRIGHT, JR.

Sworn to and subscribed before me this the 26th day of March, 1912.

W. N. KEY,
D. C. & M.

75 *Order Allowing Amendments.*

Entered *Just* 26, 1912, M. B. 24, P. 345.

J. W. WRIGHT, JR.,

vs.

BIRMINGHAM AND NORTHWESTERN RAILWAY COMPANY et al.

Be it remembered that complainant this day presented his amendments to the original bill and asked to be permitted to file same and that the same be allowed by the Court, which motion is granted and said amendments ordered filed and allowed.

76 *Amendment to Bill.*

Filed August 30, 1912.

J. W. WRIGHT, JR.,

vs.

B. & N. W. RY. CO. et al.

Complainant asks to be permitted to amend paragraph IV of his original bill filed herein by making the following change and charge at the end of paragraph IV of said bill, to wit:

That said R. M. Hall assented to and consented to said amended contract and in fact actually participated in making same and said contract, and that contract was made at said Hall's instance and request.

Complainant also asks to be permitted to amend his original bill by making the following charges that the defendant R. M. Hall, was the President and Manager and largest stockholder of the defendant, Birmingham & Northwestern Railway Company and was the President and Manager of the defendant, Jackson Construction Company, and that said R. M. Hall, as President and Manager of the Birmingham & Northwester- Railway Company made the contract with the Jackson Construction Company for the building of said Railroad and as President and Manager of the Jackson Construction Company, made both the original and amended contracts with your complainant. That said Hall both individually and as president and manager of the said Birmingham and Northwestern Railway Company and Jackson Construction Company not only participated in and consented to said contracts, but that said breaches were made and instigated by said Railway Company and said Construction Company and said Hall, and they in fact participated both jointly and
77 indiv-dually in bringing about said breaches.

The foregoing facts, and allegations were stated by Complainant to his solicitor prior to the drawing and filing of the original and amended bills in this cause, but through error or oversight on their part, were not included in said original and amended bills, as complainant is informed, believes and charges. Said allegations are pertinent, and have not before been alleged.

BOND & BOND,
C. E. PIGFORD,
Solicitors for Complainant.

STATE OF NORTH CAROLINA,
County of Johnston:

Personally appeared before me, C. M. Wilson, Notary Public in and for said state and county, J. W. Wright, Jr., with whom I am acquainted, and who makes oath in due form of law, that he is the Complainant in the above styled cause, and who states that the foregoing allegations are true.

J. W. WRIGHT.

Sworn to and subscribed to before me this 20th day of July, 1912.

C. M. WILSON,
Notary Public.

My Com. expires April 1, 1914.

Amendment to Bill.

Filed Aug. 20, 1912.

J. W. WRIGHT, JR.,

vs.

B. & N. W. RY. Co. et al.

During the hearing of the demurrers of the defendants and while the Chancellor had same under consideration, the Complainant presented to the Court and asked leave of the Court to amend his original bill, so as to particularize his claims and items of damages resulting to him by reason of the conduct of the defendants and especially the defendants, the Jackson Construction Company and R. M. Hall, and said Hall both individually and as surety for said Construction Company, in and about the construction of said railroad from Jackson, Tennessee to Dyersburg, Tennessee.

Complainant asks that he may be allowed to amend said original bill and especially the Ninth Paragraph so as to make the following additional charge, which he does by way of amendment to said bill, to wit:

Complainant would charge further that said Jackson Construction Companys contracted with him as set out in the original and amended contracts, Exhibited with the bill, for the construction of said Railroad, that said R. M. Hall became surety to complainant for the faithful performance of said contracts by said Construction Company and bound himself as such surety.

That said Hall in fact both as president and representative of said Construction Company and in his individual capacity had charge of said contract for said Construction Company.

1. That said contracts, and the universal custom known to both complainant and said defendants and each of them, it was necessary for said Construction Company to establish grade lines for the
79 construction of said roadbed as the work progressed and as needed by complainants.

He charges that the defendants and especially the defendant, Jackson Construction Company, and said Hall, refused and neglected to furnish or establish said grade lines though repeatedly called on to do so and by reason of said refusal and neglect complainant was damaged in the sum of $3500.00

2. He further charges that said defendants, and especially said Jackson Construction Company and said R. M. Hall, agreed and bound themselves to complainant to furnish all materials including ties and in sufficient quantities and as the work progressed so as not to delay complainant who had a large force of men and teams and outfit to do the work.

He charges that said defendants failed and refused to furnish said material as agreed that they would, though repeatedly called on to

do so, and by reason of said failure he was damaged to the extent of $3,700.00.

3. He further charges that said defendants and especially said Construction Company and Hall agreed and bound themselves to furnish complainant free transportation over the said railroad for his men and workmen, stock and materials and outfits, so same could be transported from point to point in the necessary construction of said railroad.

They refused and neglected to furnish said transportation though repeatedly called on to do so and by reason of said refusal he was damaged.

He charges that the defendants and especially the Construction Company and said Hall, that after defendants had furnished the two engines referred to in the supplemental contract, exhibited to the bill, complainant relying on said defendants' promise to
80 furnish material, employed a crew of hands and fuel for same and by reason of said neglect said crews were idle and waiting from day to day on the promise of defendants to furnish said material; that by reason of said refusal and neglect he incurred and paid out necessary sums of money for said purposes and by reason of same he was damaged.

Complainant charges further that though defendants had contracted to transport his crews and men and material free that they refused and neglected to do so and he was compelled to furnish fuel for engines and crews for the necessary transportating of men and material in the construction of said road under his contract. That he expended a large amount on this account, and on account of which he is damaged. By reason of the foregoing matters set out in sub-section 3 complainant is damaged in the sum of $4000.00

Complainant would most respectfully charge that the defendants and each of them, and especially said Jackson Construction Company and R. M. Hall, breached their said contracts and not only damaged the complainant in the manner and items set out as follows, to wit:

(1) The said Construction Company and said Hall agreed to furnish and establish for complainant grade lines, according to which grade lines the roadbed was to be constructed, and ties and track laid thereon; and which grade line was to be furnished complainant as the work progressed and as the same was needed by complainant so as to prevent delay in the progress of the work. Complainant charges that defendant failed and refused to furnish and establish said grade lines as the same were needed by complainant with the result
81 that complainant did not and could not know to what point or line the surface of the road should be raised or lowered. Complainant therefore graded the surface of the road bed as nearly correct as he could without a fixed grade line and laid the ties thereon to which he spiked the rails. Thereafter the said Construction Company and said Hall fixed and established the correct grade of the road bed and complainant was compelled to go back over the road bed or a great part of same and to incur additional expense for labor, material and loss of time in so doing, in raising and fixing said

road bed and embankments at the proper grade line, by which he is damaged in the sum of $3500.00.

(2) Said Construction Company and said Hall also agreed to furnish all material including ties, as the work progressed and without delay for track purposes; and said defendant further agreed that should complainant be delayed in said work by reason of defendants' failure to furnish material promptly and as needed, they would reimburse him *doe* all expenses incurred by said delays. Complainant charges that said -efendants failed to furnish him ties as needed for a long period of time subsequent to the middle of November 1911 and by reason of said failure a large number of teams, wagons and equipment of complainant used in hauling and placing ties remained idle and the work was delayed to complainant's damage in the sum of $3700.00.

(3) Said Construction Company and Hall also agreed and contracted to furnish to complainant free transportation over said Birmingham & Northwestern Railway Company's road for men and material destined for the work of building and constructing said railway. Complainant charges that said defendants
82 failed and refused to comply with their said agreement and as a result complainant was forced to expend large sums in transporting men and material over said road for the purpose of constructing and building and completing same prior to the execution of the supplemental contract Exhibit No. 2, and for which sums said defendants are liable to Complainant.

Complainant further charges that after the two said defendants had furnished him the two engines referred to in the supplemental contract, and complainant had supplied crews and fuel therefor, the same were forced to remain idle for a large portion of the time on account of said defendants furnishing to complainant no material to haul or handle, as they contracted to do, the expense of fuel and crews meanwhile continuing by reason of which complainant was damaged.

Complainant further charges that subsequent to the execution of the supplemental contract Exhibit No. 2 to the Original Bill he expended large sums in furnishing fuel for the engine and in paying crews to handle the engines and cars while actually engaged in transporting men and material over the road of defendant Railway Company as provided in the original contract for which sums said defenda-ts are liable to complainant under the terms of said contracts, Exhibit No. 1 and No. 2 to the Original Bill.

By reason of the matters set out under sub-section (3) complainant has been damaged in the sum of $4000.00 for which amount said defendants are liable to him.

(4) Said Construction Company and said Hall in said Contracts further agreed that complainant should not be required to remove slides or to replace washed material due to freshets. Said defendants also contracted and agreed and it is the universal
83 custom in works of this nature, and so understood by said defendants, for the Railway Company or its general contractor to place or have placed all ties used in the construction of

said work on or adjacent to the right of way of the road. Complainant charges that during the progress of said work a large amount of earth washed over said track upon the right of way in certain places, and in other places due to freshets, material and earth of said road and right of way washed away so that it became necessary to remove, or replace same in order to prevent further damage, and in order to operate engines and cars over said track that instead of placing ties on the right of way or adjacent thereto as said defendants contracted to do and as it was their duty to do they were frequently placed at long distances therefrom so that complainant was compelled to haul same to the right of way.

By reason of the aforesaid matters and said services rendered for and on behalf of defendants and at their instance and request, complainant is entitled to recover the reasonable value thereof which he alleged to be the sum of $2000.00.

(5) The defendants, said Construction Company and said Hall, in the original contract, exhibit 1 to the original bill and in Section VIII thereof, stipulated and agreed as follows:

"It is expressly understood and agreed that the contractor shall provide outfits, forces and equipment for the prosecution of the work covered by this contract in accordance with requirements specified in the specifications, and that he shall maintain the said forces, outfits, and equipments continuously on the work until its final completion. If the said outfits, or any of them, should be delayed in starting to work after having reached the site of the work, by a failure
84 of the Company to provide right of way, it is understood and agreed that the said Company shall pay to the said Contractor the expenses of maintaining the said outfits until such time as said right-of-way shall have been provided."

Complainant states that he complied in all respects with his part of the foregoing agreement, but that the Construction Company and Hall failed to provide rights-of-way as agreed and at the times provided, although complainant had his outfits on the ground and ready to proceed with said work at all times, but was prevented for a long period of time on account of rights of way not being furnished by defendants; by reason of which complainant paid out divers sums in expenses in maintaining his idle outfits, forces and equipments which he is entitled to recover from said defendants.

Complainant further charges that by reason of the delays on the part of defendants as aforesaid in obtaining rights of way he suffered other and further damages for which said defendants are liable to him, to wit: Complainant had at the time said rights of way were to have been furnished the opportunity and offer from a responsible Railroad Contractor and builder, who offered to give a sufficient bond to complainant for the faithful performance of his work, that he would do all the grading required on said line of road for fourteen cents per cubic yard; but by reason of said defendants not having said rights of way and it being uncertain whey they would be furnished complainant, said party refused to wait until they obtained or to enter said contract; complainant states that he was afterwards

compelled to pay from 25 cents to 40 cents per cubic yard for having the same work done and was damaged thereby.

By reason of the matters set out in sub-section (5)
85 complainant has been damaged in the sum of $10,000.00 for which amount said defendants are liable.

(6) Said Construction Company and said Hall further agreed that if complainant should be delayed on account of failure to furnish him material, that the Construction Company would reimburse him for all expenses caused by such delay; Complainant charges that said Construction Company and Hall failed to furnish him a large amount of material including steel rails, angle bars, bolts and spikes and bridge material, all of which were necessary in the construction of said road, and which said defendants agreed to furnish, but which they failed and refused to furnish after due notice; whereby complainant was retarded and delayed in his work and incurred additional expenses by reason of said delays amounting to $6,500.00 for which said defendants are liable to him.

(7) Said Construction Company and Hall further agreed to have shipped to complainant steel rails for the track as needed by him; that instead of so doing they delayed for several months in making any shipment thereof and then had shipped to him practically all of said rails in two shipments which were made within a few days of one another and reached Jackson about the same time; that said rails were contained in a large number of cars, on which heavy demurrage and charges at once began to accrue; that in order to stop said demurrage charges complainant was compelled to unload said rail- in Jackson which he did, he not being in a position, under the terms of his Original and Supplemental contracts with defendant, to use all of said rails or put them in position in less time than several months; that as the rails were needed he was compelled to
86 reload them and haul them to the points desired and there unload them again; and by reason of thus unloading, loading and again unloading said rails he was put to heavy expense, to wit: In the sum of $2,500.00 for which amount he is entitled to a decree against said defendants.

(8) Said Construction Company and Hall further agreed to furnish centers for track in order that complainant might bring the track to a perfect line as the work progressed. Instead of doing so, however, said defendants failed and refused to furnish said centers until long after complainant had finished most of the work, with the result that complainant was compelled in the first instance to line the track by guess work as nearly correct as possible, and then to go over the same work again and bring the track in true line, after the same was furnished by defendants' engineers. As a result of said defendants' failure and refusal to furnish said centers as called for, the additional work and expense and loss of time thereby entailed on complainant, he is entitled to a decree against said defendants for amount and value of same to wit: $3,000.00.

(9) Complainant would further show that he had the opportunity to employ Messrs. Ingram & Hyneman, competent railroad contractor to do all the track laying of said railway at an amount which would

have cost him $10,000.00 less than he was finally compelled to pay therefor, after having same done at the lowest prices thereafter obtainable; that said Ingram & Hyneman were ready and willing and had sufficient equipment outfits and forces with which to enter upon, carry on and complete said work and were anxious to undertake it, but said Construction Company and Hall failed and refused to obtain and deliver material for said work as needed and called for after due notice with the result that said parties became discouraged
87 and finally refused to undertake the work because of defendant's dilatory and unbusinesslike tactics; by reason of said delay and consequent loss, complainant is entitled to a decree again t said defendants in the sum of $10,000.00.

(10) Complainant would show that he had the opportunity to employ H. C. Watkins, a competent bridge builder and contractor, to construct the bridges on said railroad for an amount of $5,000.00 less than complainant was finally compelled to pay therefor after having same done at the lowest bids thereafter obtainable; that said H. C. Watkins was ready and willing and had sufficient equipment, outfits and forces with which to enter upon, carry on, and complete said work and was anxious to undertake it, but said Construction Company and Hall failed and refused after due notice to obtain and deliver material for said work as needed and called for, with the result that said Watkins became discouraged and finally refused to undertake the work because of said defendant's dilatory and unbusinesslike tactics; by reason of said delay and consequent loss complainant is entitled to a decree against said defendants in the sum of $5,000.00.

(11) Said Construction Company and Hall contracted and agreed to furnish complainant monthly estimates of work done by him and amounts to which he was entitled which they failed and refused to do for some months prior to his leaving the work. For the purpose of ascertaining the exact amount due him by said defendants for services rendered and also for the purpose of learning how much work he had done so as to settle with his employees complainant has a correct estimate of same made about the time of leaving the service of said defendants, by competent engineers for which estimate complainant paid the sum of $1,000.00 and for which amount defendants are liable to him.

Complainant would most respectfully state and charge that
88 the defendants and especially the said Jackson Construction Company and R. M. Hall, refused and neglected to comply with said contracts in the several particulars above set out, though repeatedly called on to do so and though they promised from time to time to comply and on which promises he relied and by reason of said refusal and breaches he was and is damaged in the several items and manner as above set out and for which he is entitled to a decree against said defendants, and especially the Jackson Construction Company and R. M. Hall.

That said damages are the result of said breaches and that defendants were not only aware of the conditions existing which would

result from said breaches, but knowing same, breached said contracts and their duty to complainant.

BOND & BOND,
C. E. PIGFORD,
Solrs. for Compt.

89 *Order Allowing Amendments.*

Entered August 31, 1912, M. B. 24, P. 408.

J. W. WRIGHT, JR.,

vs.

BIRMINGHAM AND NORTHWESTERN RAILWAY COMPANY et al.

The two amendments to the original bill having been presented by complainants who asked leave of the Court to file the same. The Court is pleased to allow said amendments to be filed, except as to those parts of the same which seek to hold R. M. Hall individually liable outside of his surety-ship, the Court refusing to allow the amendments to be filed wherever the same seek to hold R. M. Hall individually liable and not as surety, and said amendments are accordingly so filed.

The demurrers heretofore filed by consent are allowed to stand also to the amendments, with privilege of counsel for R. M. Hall to file additional grounds of demur-er to the amendments.

Complainant excepts to the action of the Court in not allowing the amendments to be filed as a whole.

The Court declined to allow the amendments so far as they seek to hold Hall individually liable and not as surety because no reason is shown why they were not incorporated in the original bill.

90 *Order of Revivor.*

Entered April 19, 1913, M. B. 24, P. 580.

69.

J. W. WRIGHT, JR.,

vs.

BIRMINGHAM AND NORTHWESTERN RAILWAY COMPANY.

Be it remembered that on this the 19th day of April, 1913, the solicitors for complainant suggested the death of the complainant, J. W. Wright, Jr. as having occurred since the entry of the decree disposing of demurrers on March 22nd, 1913, whereupon the solicitors for the several defendants admitted the death of said J. W. Wright, Jr.

Thereupon came Mrs. Susie E. Wright, administratrix, and widow of J. W. Wright, Jr., deceased, and presented her letters of administration on the estate of J. W. Wright, Jr., deceased, which motion was by the Court allowed, and the cause revived accordingly, and ordered to stand in the same plight and condition in which it stood at the date of the death of said J. W. Wright, Jr.

Thereupon on application of the several defendants who by the former decree of the Court disposing of demurrers were given sixty days within which to answer they and each of them are by the Court given and granted sixty days from the date of the entry of this decree of revivor within which to answer the bills filed in this cause.

91 *Answer of Jackson Construction Company also Filed as a Cross-bill.*

Filed July 14, 1913.

R. D. 5230.

J. W. WRIGHT, JR.,

vs.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY et al.

The separate answer of the defendant Jackson Construction Company to the original bill as amended, as well also the amended and supplemental bills filed against it and others in the above entitled cause, said answer being also filed as a cross-bill.

Said defendants, the Jackson Construction Company for answer in this cause to so much and such parts of the Bills, original, supplemental and amended, filed by complainant, as have not been dismissed upon demurrer by the Court, and as this respondent is advised it is material for it to answer, now answering says:

I.

Respondent admits that its codefendant, Birmingham & Northwestern Railway Company is a Tennessee corporation and that pursuant to its corporate powers, it entered into a contract with this respondent whereby this respondent was to construct a line of railway for the Railway Company from Jackson Tennessee to Dyersburg, Tennessee, but inasmuch as the details of said contract between this respondent and its codefendant Birmingham & Northwestern Railway are not necessary to be set forth in this answer, in view
92 of the action and ruling of the Court upon the demurrers filed in this cause and heretofore disposed of at a former term of the Court, the same are not now stated. Respondent is advised that the best evidence of the capitalization and corporate powers and purposes of creation of the Birmingham & Northwestern Railway Company and of this respondent is the charter of incorporation

granted by the State of Tennessee to each of them, which said charters being now of record, can be put in evidence and will show for themselves the date of issuance and all other material facts evidenced thereby. However, respondent admits that at the time it contracted with the Birmingham & Northwestern Railway Company to construct line of railway for it, that this respondent and said Railway Company were both duly and legally incorporated and organized under the laws of the State of Tennessee, and that the principal offices and situs of each *was* in Madison County, Tennessee. Respondent admits that at said time R. M. Hall was the president of this respondent, but emphatically denies that the said R. M. Hall was at said time the president of the Birmingham & Northwestern Railway Company or that the said R. M. Hall acted for said Railway Company in the execution of said contract between the said corporations, the real facts being that Jno. L. Wisdom was the president of said Railway Company at said time and as such president under the direction of the Board of Directors of said Railway Company executed for it said contract had and made with this respondent, which fact was well known to complainant when he filed his original bill in this cause.

93 II.

Respondent admits that on April 13th, 1911, it entered into a contract with complainant J. W. Wright, Jr., relative to the construction of said line of railway from Jackson Tennessee to Dyersburg, Tennessee, which respondent under its contract with the Birmingham & Northwestern Railway Company was obligated to build, but respondent denies that Exhibit "I" to the original bill is a true and exact copy of said contract.

Respondent is advised that when the contract between itself and complainant J. W. Wright, Jr., is exhibited in proof the same will fully disclose the terms, conditions and obligations assumed and imposed thereby upon the parties, and that it would unduly lengthen this answer for this respondent to undertake to respond to each charge and allegation made by complainant as to what were the provisions of said contract. Respondent however emphatically denies that it at any time or in any manner failed to fully live up to, perform and faithfully carry out its part of said contract, upon the contrary the said J. W. Wright, Jr., did repeatedly and in numerous particulars breach the said contract and did fail and refuse without lawful excuse to live up to, perform and faithfully carry out his part of said contract, all of which will be fully shown to the Court by the proof when taken in this cause. Respondent being bound by its contract with the Birmingham & Northwestern Railway Company to build said line of railway was especially anxious that J. W. Wright Jr. should expeditiously carry out and perform his contract with respondent, and this respondent did everything within its power to
94 have the said J. W. Wright Jr. to perform and fully carry out his said contract; but notwithstanding such efforts of respondent said J. W. Wright Jr. refused and failed to faithfully carry out and perform the same, and did notify this respondent that he would

not further undertake to carry out and perform the same, and did in fact actually abandon further performance of his said contract and refuse to further attempt to complete and carry out his said contract with this respondent. Thereupon this respondent was by the said wrongful and unlawful breach of the contract by said J. W. Wright Jr. *was* placed in a most embarras-ing position as it was under contract with the Birmingham & Northwestern Railway Company to construct and complete said line of railway and said Railway Company was anxious that said line of railway be completed as soon as possible and was demanding that this respondent should expeditiously carry out and perform its said contract with said Railway Company. Respondent is advised that it would unduly and unnecessarily lengthen this answer to state in detail what was done by it to have the said J. W. Wright Jr. to proceed to carry out and perform his contract with respondent; or to state in detail the unreasonable and unwarranted acts and conduct of the said J. W. Wright Jr. relative to said contract and his refusal to carry out the same; since all of said matters are evidential facts to be shown by the proof. However, without going into detail as to what preceded, led up to, and brought about the supplemental and amended agreement dated November 14th, 1911, referred to in complainant's bill, respondent admits that it did make and enter into a supplemental and amended agreement with the said J. W. Wright Jr. on said date, by which the
95 original contract of April 13th 1911 was modified and changed in the particulars and to the extent set forth in said amended and supplemental agreement which was in writing and shows for itself what was then agreed to by and between the parties thereto; and as exhibit "2" to complainant's supplemental and amended agreement, and as this respondent is willing to admit that said Exhibit "2" is a true copy of said supplemental and amended agreement as the same is signed and executed by the parties thereto, respondent is advised that it is proper for it to admit for the purpose of this litigation that said Exhibit "2" to the original bill is a true copy of said supplemental and amended agreement as made and entered into by this respondent and complainant, J. W. Wright, Jr., on November 14, 1911, and therefore this respondent does admit that Exhibit "2" to the original bill in this cause is a true copy of said supplemental and amended agreement had and made between complaintiff J. W. Wright, Jr., and this respondent on said date of November 14, 1911. However, this respondent does not admit the charges made by complainant as to the provisions, interpretations and constructions of said supplemental and amended agreement exhibit "2" to the original bill, as the said paper writing shows for itself what the agreement of the parties was as is evidenced thereby, and it is for the court to construe and interpret the same.

III.

Respondent further answering shows to the Court that by *and* supplemental and amended agreement made between this respondent and the complainant, J. W. Wright, Jr., on November 14,

96 1911, Exhibit "2" to complainant's original bill, that the complainant J. W. Wright Jr., expressly agreed to waive and release all claims of demands he might have against this respondent on account of alleged delays, as well also any and all claims that he might then or thereafter have against this respondent on account of extra work and services except to the extent of the sum of $2500.00, which sum was acknowledged by the said J. W. Wright Jr. to be in full compromise settlement of any and all present and future claims which he might have on account of extra work or services and "force" account; and this respondent now answering defends and says that by the making of said agreement, which was for a valid consideration, and mutually binding upon the complainant J. W. Wright Jr., and this respondent that the complainant is now precluded from asserting and seeking to set up and establish any claim or demand which he might otherwise have against this respondent arising from and existing on account of any damages sustained by him by reason of any alleged delay occasioned by this respondent or by any one for whose acts and conduct this respondent might be held responsible; and further that complainant in this cause is now precluded from asserting any claim against this respondent because of extra work and services and "force" account, other than the sum of $2500.00, which by said agreement was agreed to by the parties as a full compromise settlement of any and all claims which the said J. W. Wright Jr. might then or thereafter have against this respondent on account of extra work and services and "force" accounts. This respondent does not mean to be understood that it now owes the said J. W. Wright, or his legal representatives the said sum of $2500.00, as this *this* respondent owes to the said J. W. Wright Jr. and his legal representatives nothing; but means to be understood as saying that
97 the said sum of $2500.00 was to represent the full amount and extent of any and all claims which the said J. W. Wright, Jr., then had or might thereafter have against this respondent on account of extra work and services and force account; and by the said compromise agreement had and made between the parties thereto, said sum of $2500.00 was to be the full measure and extent of this respondent's liability to the said J. W. Wright Jr., on account of any claim he then had or might thereafter have against this respondent on account of extra work and services and "force" accounts. As to all claims or demands against respondent on account of alleged delays the said J. W. Wright Jr., expressly agreed to waive and release the same, which agreement is not binding on complainant.

Respondent further answering states that the reason it did not pay to the said J. W. Wright Jr. the sum of $2500.00 so agreed on at the time of the making of the said supplemental and amended agreement of November 14, 1911, was that at that time this respondent had largely overpaid the said J. W. Wright Jr., and for and on his account at his instance and request more money than was actually due and coming to him under his said contract had with respondent at that time, and that because the said J. W. Wright Jr. having at that time been largely paid by respondent more than was then justly due him, that no demand was then made by the said J. W.

Wright Jr. that said sum of $2500.00 be then paid to him, but the agreement as expressed was that the said sum was to represent the full amount and extent of any and all claims he then had or might
98 thereafter have against this respondent on account of extra work and services and "force" account, and it was understood and agreed between this respondent and the said J. W. Wright Jr. that when he had completed his contract with this respondent, that upon final settlement he was to be allowed a credit in the amount of $2500.00 to cover any and all claims he then had or might thereafter have against this respondent on account of extra work and services and "force" account. Respondent further answering states to the Court that notwithstanding the agreement with the said J. W. Wright Jr. as set forth in the said supplemental and amended agreement of November 14, 1911 that he would within sixty working days have fully completed the said line of railway from Bells to Dyersburg, Tennessee, in accordance with his contract, that the said J. W. Wright Jr. thereafter within a short time again failed and refused to perform his contract with this respondent and could not be induced to enter upon the further performance thereof except upon condition that this respondent would secure for him the sum of $15,000.00 in cash. Respondent at that time did not owe to the said J. W. Wright Jr. said sum of $15,000.00 or any other amount, as it had largely overpaid him for and on his account at his instance and request at that time more than was justly due and owing to him, but as this respondent was under contract with the Birmingham & Northwestern Railway Company to construct said line of railway and was anxious to fulfill and carry out promptly without delay the said contract with the said Railway Company, and the said Railway Company was urging upon this respondent and demanding
99 that it fulfill its contract as expeditiously as possible, and as the said J. W. Wright, Jr., then had the contract with this respondent to build said line of railway according to provisions of his contract with this respondent, this respondent deemed it good business policy to secure for the said J. W. Wright, Jr., the said sum of $1,500.00 which he was then demanding should be advanced to him upon the contract before he would further proceed to carry out and perform the same, and thereupon this respondent did advance to said J. W. Wright, Jr., said sum of $1,500.00 upon the express condition and with the express agreement at the time made by the said J. W. Wright, Jr., as a condition and as a part of the consideration for the advancement of said money that he would hold this respondent, the Birmingham & Northwestern Railway Company and R. M. Hall, harmless and free from liability for any claims contracted by him with subcontractors, and further that he would ask for no additional payment on account of the building of said railroad until the completion of his said contract with this respondent. Respondent emphatically denies the allegations in complainant's bill that it or any person for whose acts and conduct it could be held responsible, threw any obstacles in the way of the performance by J. W. Wright, Jr., of his contract with this respondent; that it sought to embarrass said J. W. Wright, Jr., in any wise in his carrying out

of his said contract; that it refused to give estimates and make payments as agreed to and thereby prevented the said J. W. Wright, Jr., from meeting his own obligations promptly. Respondent says that it is false and untrue and it emphatically denies the charge made in complainant's bill that there is no consideration for the said receipt and agreement executed by the said J. W. Wright, Jr.,
100 at the time when the $1,500.00 was paid, and that he, the said J. W. Wright, Jr., was forced to sign the same because of any refusal of this respondent to pay him what was then justly due, and that the said J. W. Wright, Jr., was not then and is not now legally bound by the said agreement so executed by him, and which in his bill he admits that he did sign and execute. As previously stated, this respondent at said time that said $1,500.00 was by it advanced to the said J. W. Wright, Jr., then owed to the said J. W. Wright, Jr., nothing, and was under no legal obligation to then pay him anything, and instead of this respondent having secured said agreement from the said J. W. Wright, Jr., by any reason of any wrongful act or conduct arising and existing upon the part of this respondent, and its taking advantage of its wrong the real facts and truth of the matter were and are that the said J. W. Wright, Jr., by his own misconduct and unlawful failure and refusal to perform his contract with this respondent, and because of the present necessities of this respondent arising from its contract with the Birmingham & Northwestern Railway Company, and its desire to have said line of Railway completed without delay, did force this respondent to advance and pay to the said J. W. Wright, Jr., the said sum of $1,500.00, when at said time this respondent was not lawfully due and owing or obligated to pay the said J. W. Wright, Jr., anything. However, as it was necessary for this respondent to advance said sum of $1,500.00 to the said J. W. Wright, Jr., in order to have him to then continue to make any effort to further attempt to carry out and perform his contract with this respondent, and as the said J. W. Wright, Jr., as a consideration for the advancement of said sum at said time solemnly agreed that he would ask no additional payment on account of the build-
101 ing of said line of railway until the completion of his contract with the respondent, and that he would hold this respondent and the Birmingham & Northwestern Railway Company and R. M. Hall harmless and free from liability from any claims contracted by him with subcontractor, it being then the case that certain parties were making claims as sub-contractors of J. W. Wright, Jr., against this respondent and the Birmingham and Northwestern Railway Company and R. M. Hall which were annoying and embarrassing and which the said J. W. Wright, Jr., has failed to pay because, as he claimed, he had no money with which to satisfy the same, but which he at said time promised and agreed to pay in so far as the same were just and proper, out of said sum of $1,500.00, when said money was advanced to him at said time; this respondent accordingly advanced said money above stated and took from the said Wright his written obligation in the words and figures as set forth and averred in complainant's original bill.

IV.

Respondent further answering, defends and says that notwithstanding the promises, agreements and obligations made and assumed by the said J. W. Wright, Jr., under his original contract with this complainant, and under the supplemental and amended agreement of November 14, 1911, and under the agreement of December, 1911, when $1,500.00 was advanced, that the said J. W. Wright Jr. wholly failed and refused to live up to, carry out and perform the said contracts and agreements, and did finally, without ever having completed his said contract and without any lawful excuse for not completing the same, abandon the said contract, failed, and refused to complete the construction of
102 said line of railway from Jackson to Dyersburg, Tennessee, and has never fully lived up to, carried out, and completed his contract and agreement had with this respondent and hereinbefore referred to, and that because of such abandonment of the contract by the said J. W. Wright Jr. and his failure and refusal to fully perform and carry out the same as he was obligated to do, that complainant is now precluded from asserting any rights against this respondent. Respondent would further show and state to the Court that it has already largely overpaid to the said J. W. Wright Jr. and for and on his account at his instance and request more than was due and owing to him for anything that he did or furnished or has done and furnished in pursuance of any effort on his part to perform and carry out his said contracts and agreements had and made with this respondent; and that furthermore this respondent has already paid and advanced to the said J. W. Wright Jr. and for and on his behalf at his instance and request largely more than is the actual value and worth of any benefits flowing to this respondent or to the Birmingham & Northwestern Railway Company from anything done or had done, furnished or had furnished, by the said J. W. Wright, Jr., his agents, employes, or sub-contractors in the matter of the construction of said line of railway from Jackson, Tennessee, to Dyersburg, Tennessee.

Respondent would further state and show to the Court that on account of the failure of said J. W. Wright Jr. to faithfully carry out and perform his said agreements and conttracts had and made with this respondent, that this respondent has been forced, in the performance of the contract with the Birmingham & Northwestern Railway Company to incur divers and large amounts of expense in addition to the sums paid and advanced by it to the said
103 J. W. Wright Jr. for and on his account, and at his instance and request and that the aggregate amount of the liabilities so incurred by this respondent, and which have been paid by it and for which it may yet be held legally liable, and which would not have arisen had J. W. Wright, Jr. faithfully performed his said contract far exceeds the contract price which it was to pay the said J. W. Wright Jr. under its contract with him, had he fully lived up to and faithfully carried out and performed the same,

and that for all of said additional expenditures and liabilities so sustained by this respondent, it has the legal right to set off and credit against any claim which complainant may lawfully establish against it in this case, provided the Court should find from the pleadings and proof that this respondent has not already fully paid and more than paid the said J. W. Wright Jr. for and on his account at his instance and request for everything done and had done by him in the matter of constructing said line of railway from Jackson, Tennessee, to Dyersburg, Tennessee.

V.

Respondent further answering would show to the Court that the said J. W. Wright Jr. not only failed and refused without lawful excuse, to faithfully perform and carry out his contracts and agreements had with this respondent relative to the construction of said line of railway from Jackson to Dyersburg, Tennessee, but that the said J. W. Wright Jr. undertook and did corrupt the Chief Engineer of this respondent, one Mike Harvey at the instance and request of said J. W. Wright Jr. instead of working for the
104 interest of this respondent, did by collusion with the said J. W. Wright Jr. make false statements and reports as to the nature and extent of the work and services being done and rendered by said J. W. Wright Jr. in the construction of said line of railway; and when this respondent became aware of the fraud being thus perpetrated by the said J. W. Wright Jr. and the said Mike Harvey and the collusion existing between them, this respondent then and there discharged the said Mike Harvey from its employ and declined to be bound by any of the false and fraudulent reports and statements made and rendered by him.

Respondent does not know what papers the complainant may have purporting to be signed by the said Mike Harvey as Engineer of this respondent but this respondent charges and defends that the said Mike Harvey while ostensibly in the employ of this respondent, and at such time supposed to be looking after the interest of this respondent, was nevertheless secretly being fraudulently induced by the said J. W. Wright Jr. to make false and fraudulent statements as to the work and services performed and rendered by the said J. W. Wright Jr. relative to the construction of said line of railway from Jackson to Dyersburg, Tennessee, and that all such statements and reports so made and furnished by said Mike Harvey while purporting to act as the Chief Engineer of this respondent are not therefore binding upon this respondent.

Respondent further defends and charges that by reason of the fraud thus perpetrated upon it by the said J. W. Wright, Jr. in secretly colluding with its said Chief Engineer, Mike Harvey and in fraudulently having him to disregard his duties and obligations as a servant and employee of this respondent, that it is not
105 bound by any act or conduct of the said Mike Harvey while purporting to act as its Chief Engineer, which was so fraudulently induced and brought about by the said J. W. Wright Jr.,

and that any provision in the contracts and agreements had between this respondent and the said J. W. Wright Jr., which provides or can be construed to provide as making final the acts and conduct of the said Mike Harvey as Chief Engineer of this respondent, and accordingly binding upon this respondent, that the said provision or provisions of said contracts and agreements had between this respondent and J. W. Wright Jr. and the said Mike Harvey, which was fraudulently brought about and induced by the said J. W. Wright Jr., all of which fraudulent acts and conduct upon the part of the said J. W. Wright Jr., and the said Mike Harvey will be fully shown and disclosed by the proof.

VII.

Respondent further answering defends and says, that not only did the said J. W. Wright Jr. fraudulently collude with and induce the said Mike Harvey, its Chief Engineer, to prove recreant to the trust imposed in him by this respondent; but the said J. W. Wright Jr. did on divers and sundery times attempt to induce other employees of this respondent to make false statements and reports favorable to the said J. W. Wright Jr. and to do other fraudulent acts antagonistic to the interest of this respondent and violative of their duty as such employees of this respondent. On one occasion the said J. W. Wright Jr. offered the sum of to wit:

106 $500.00 to one John Todd while he was in the employ of this respondent if he, the said Todd, would make a false statement and report as to the work and services that had been rendered by the said J. W. Wright Jr. to this respondent under the said contract relative to the construction of said line of railway; which bribe and unlawful solicitation the said Todd was honorable enough to decline. How far and to what extent the said fraudulent acts and conduct of the said J. W. Wright Jr. became and were effective as to the number of the employees of respondent who were thus sought to be corrupted by the said J. W. Wright Jr., this respondent is not now fully advised, as it is extremely difficult to uncover fraud of this nature and character, but this respondent expects to show by the proof all of the fraudulent acts and conduct of the said J. W. Wright Jr. as it may be able to prove; and respondent is advised that a Court of Equity, when such fraud or bribery and attempted bribery on the part of the said J. W. Wright Jr. is disclosed by the proof in this cause, will not permit the complainant to profit thereby or to hold this respondent bound by any acts of any employees that was so fraudulently induced and occasioned by the said J. W. Wright, Jr.

VII.

Respondent further answering defends and says, that not only is it false and untrue that the complainant now has any value or just claim against it for or by reason of any of the matters set forthe in the bills, original, supplemental and amended as filed in this cause, as have not already been dismissed on demurrer; but complainant

should be repelled from Court and given no relief because of
107 the following facts which this respondent by way of answer sets up and shows to the Court, towit:

Under and by virtue of the statute laws of Tennessee which was in full force and effect at the time the contract between this respondent and the said J. W. Wright Jr. was made and entered into, and which statute law ever since then has continued to exist and be in full force and effect as the law of this State; it was and is provided in substance and effect as follows, to wit: That each person, firm or corporation engaged in the business of constructing bridges, waterworks, railroads, street paving construction work, or other structures of a public nature, shall pay a privilege tax as fixed and authorized by said statute law of Tennessee, before such person, firm or corporation engaging in such business or avocation, shall be authorized to lawfully pursue such business or avocation and to do and perform any act in the pursuit thereof within the State of Tennessee; and any act done within the State of Tennessee by any person, firm or corporation in the pursuit of such business or avocation without having first paid the privilege tax so made a prerequisite to the engaging in such business or avocation within the State of Tennessee was and is declared to be unlawful and to be a misdemeanor; and no person, firm or corporation could or can lawfully commence or continue to engage in the business of constructing bridges, waterworks, railroads, street paving construction work, or other structures of a public nature, without having first paid the privilege taxes so fixed and authorized by said statute law of Tennessee and having obtained from the County Court Clerk, authorized to collect the said privilege tax, a license showing the payment of such privelege tax, and the authority to engage in such business or avocation, as is by said statute
108 law expressly declared a necessary prerequisite to the lawful commencement of or continuance in, the engaging in such business, by any person, firm or corporation within the State of Tennessee.

Respondent further answering defends and says that the complainant J. W. Wright, Jr., at the time he entered into and made the contract with this respondent relative to the construction of the said line of railway from Jackson, Tennessee, to Dyersburg, Tennessee, that at said time the said J. W. Wright, Jr., had not paid the privilege tax that was then and there required to be paid by him under the Statute law of Tennessee nor had he secured any license authorizing him to engage in the business of constructing said line of railway which was to be built entirely within the State of Tennessee in the Counties of Madison, Crockett, and Dyer of said State; and because of such failure upon the part of the said J. W. Wright, Jr., to pay said privilege tax and obtain such license in manner and form as then required by the statute law of the State of Tennessee, he was then and there without lawful authority to make said contract or to do and perform any act in furtherance thereof.

Respondent further answering defends and says that at no time while the said J. W. Wright, Jr., was engaged in the business of the construction of said line of railway from Jackson to Dyersburg,

Tennessee, he had paid the privilege tax then and there justly due and owing by him under the statute law of Tennessee aforesaid nor had he obtained a license as required by said statute law authorizing him to engage in the business of constructing said line of Railway, and every act done and performed by him and those in his employ and working for and under him, either as employee, subcontractor or otherwise, in the matter of the construction of said line of
109 railway was unlawful and in violation of the express provisions of said statute law of Tennessee, and that complainant and all persons setting up in this proceeding any rights as arising to them by virtue of any alleged claim, and the said J. W. Wright, Jr., is now making against this respondent, should be repelled from this Honorable Court, and denied any and all relief in this cause.

Respondent further answering defends and says, that it is advised that after the said J. W. Wright, Jr., had ceased to do any further work upon said line of railway and after he had abandoned any and all efforts to perform and carry out his contract with this respondent relative to the construction of said line of railway, and just a short while before this original bill was filed in this cause, that the said J. W. Wright, Jr., acting upon advice of his attorneys undertook to make some sort of payment to the County Court Clerk- of Madison, Crockett and Dyer Counties in the State of Tennessee, for the purpose of satisfying the privilege tax which was and had been lawfully due and owing by him under the statute law of Tennessee because of his having engaged in the business of construction of said line of railway, and did receive some sort of paper writing from said County Court Clerks evidencing such payment as was then made by him. Respondent has not seen the said paper so obtained by the said J. W. Wright, Jr., from said County Court Clerks but upon information and belief it shows to the Court that said paper writings do not show the true facts attempted to be evidenced thereby; and respondent states and shows to the Court that the real facts are and were that J. W. Wright, Jr., had at no time prior to the making of the said contract of April 13th, 1911, had between him and this respondent relative to the construction of said line of railway from Jack-
110 son to Dyersburg, Tennessee, paid the privilege tax required by the statute law of Tennessee then and there in full force and effect; and that at no time during which the said J. W. Wright, Jr., was actually engaged in the business of constructing said line of railway and in attempting to perform his said contract with this respondent as originally made and as subsequently modified by the supplemental and amended agreement of November 14th, 1911, had the said J. W. Wright, Jr., paid or attempted to pay under the statute law of Tennessee as aforesaid: and that it was not until the day his original bill in this cause was filed or a short while previously to filing of his said original bill, and at a time subsequent to the making of his said contracts and the actual performance of services in an attempt to construct said line of railway, that the said J. W. Wright, Jr., made any payment of any privilege tax required of him by said statute law of Tennessee, or any attempt to comply with the requirements of said statute law of Tennessee; and that the said J. W.

Wright, Jr., at the time of the making of his said contracts with this respondent and all along during the time he was engaged in the business of constructing said line of railway from Jackson to Dyersburg, Tennessee, had no license authorizing him to engage in such business within the State of Tennessee and had not paid any privilege tax required of him as a prerequisite condition to his engaging in such business in the State of Tennessee; and that every act of the said J. W. Wright, Jr., and of his employees and sub-contractors had and done in pursuit of the business of constructing said line of railway from Jackson, Tennessee, to Dyersburg, Tennessee, was unlawful and violative of the provisions of said statute law of Ten-
111 nessee, and wholly without warrant or authority of the law.

Respondent therefore further answering defends and says that because of the said provisions of the statute law of this State and of the failure of the said J. W. Wright, Jr., to comply with the same as above set forth, that complainant has no standing in Court and no right to invoke the aid of this Honorable Court in this cause, and should be repelled and suit dismissed at complainant's cost.

VIII.

Respondent further answering, availing itself of the right granted by the decree of the Court overruling section I, Clause 6, Section 2, C-ause 1, and Section 3, Clause- 1, 2, 3, and 4 of its demurrer, in which the right was granted to this respondent to rely in its answer upon the defenses thus made by its said demurrer, does now defend and say that complainant, if for any reason by the Court, held entitled to maintain this suit against respondent should be put to an election as to the particular basis upon which a recovery against this respondent is sought, that is whether upon a basis of a performance of the contract, or damages for the breach of the same by this respondent, or upon a quantum meruit.

If complainant elects to proceed upon the basis of a quantum meruit, then respondent defends and says, it can not be so held, since J. W. Wright, Jr., having first contracted with this respondent, can not abandon or repudiate his contract, thereby relieving himself from the legal obligations of such contract, and by a suit upon a quantum meruit thereby substitute an implied contract in lieu
112 of the express provisions of the *of the* contract actually made.

The pleadings in this cause having admitted the making of an express contract between J. W. Wright, Jr., and this respondent, no implied contract can be substituted for the express contract made between them. Moreover, respondent denies that it has received from J. W. Wright, Jr., any benefits of value in excess of what this respondent has already fully paid to him and for and on his account at his instance and request.

If the complainant elects to proceed upon the basis of a performance of the express contract between J. W. Wright, Jr. and this respondent, then respondent defends and says that complainant cannot recover anything against it for the reason that the said J. W. Wright Jr. did himself unlawfully fail and refuse to faithfully live

up to, perform and carry out his said contract with *complainant*, and that he has already received from respondent, paid to him and for and on his account at his instance and request more money *that* was justly due him for anything done by him in any effort made by him to perform his said contract with respondent, and further, that the said J. W. Wright Jr. by having failed to faithfully perform his said contract with this respondent and having unlawfully breached the same has largely damaged this respondent, all of which damages this respondent has a legal and equitable right to set off and credit against any claim complainant might under said contract have against it.

If complainant elects to proceed upon the basis of seeking damages against this respondent for any alleged breach of contract by this respondent, then this respondent defends and says that it is not liable to complainant for the reason that it did not in any
113 respect breach its said contract with J. W. Wright Jr. as by complainant alleged, and furthermore the said J. W. Wright Jr. did himself first breach said contract and did fail and refuse to fathfully live up to, perform and carry out the obligations imposed upon him by said contract and said J. W. Wright Jr. having himself unlawfully abandoned and breached said contract, complainant can not now be heard to claim any damages because of any alleged breach of said contract by this respondent. Moreover J. W. Wright Jr. suffered no damages because of any breach of said contract by this respondent, but upon the contrary this respondent has suffered and sustained large damages because of the failure and refusal of the said J. W. Wright Jr. to faithfully carry out his contract with this respondent, all of which will be shown by the proof, and instead of this respondent being liable to complainant for any alleged breach of said contract, the real facts and truth of the matter is that complainant is justly indebted to this respondent for the full amount of the damages sustained by it, because of the unlawful breach of the said contract by the said J. W. Wright, Jr.

IX.

Each and every allegation of the bills, original, amended and supplemental, filed in this cause by Complainant insofar as the same have not been dismissed by the Court under its decree disposing of the demurrer filed by this respondent, and which have not herein-
before been expressly admitted or denied by this respondent,
114 are here and now generally denied by this respondent, as fully as if taken up seriatim and a special denial made thereto; and this respondent here and now demands of the complainant that such allegations, where the same are material to any adjudication of liability against this respondent, be established by the proof.

And now having fully answered, this respondent prays to be hence dismissed with its reasonable cost.

X.

And now having fully answered the allegations made against it by complainant's pleadings, and being advised that to better protect its interest and defense in this cause that a cross bill should be filed, the Jackson Construction Company assumes the character of a cross complainant and makes the following charges of fact, to wit:

A.

It charges that each and every statement of fact made in its foregoing answer are true and without repeating the same here and now, refers to and adopts the same as a part of its cross bill.

B.

It charges that it is duly incorporated under the laws of Tennessee with its situs in Madison County Tennessee, and as such corporation has a right to sue and be sued in the Courts of Tennessee.

115 C.

It charges that J. W. Wright Jr. has died intestate since his bills, original, amended and supplemental were filed and -fter its demurrer thereto was filed and after the decree of the Court thereon was passed and ordered entered; and that this wife, Susie E. Wright has been appointed and qualified administratrix of his estate by the County Court of Madison County Tennessee and the original suit herein begun has been duly revived in her name as Administratrix of the said J. W. Wright Jr.

It charges that the said Susie E. Wright, Administratrix, of the said J. W. Wright Jr. having voluntarily appeared in this cause and had the same revived in her name as such Administratrix, that as such Administratrix she is subject to the jurisdiction of the Court in this cause and that it is entitled to have her made a cross defendant in this cause and to require her to make defense as such cross defendant.

D.

It charges that on to-wit: April 13th, 1911, it made a contract with the said J. W. Wright Jr. relative to the construction of a line of Railway from Jackson Tennessee to Dyersburg, Tennessee, this cross complainant prior to said time having contracted with the Birmingham and Northwestern Railway Company to build said line of railway for it. The original contract so made between J. W. Wright Jr. and the Jackson Construction Company on to wit: April 13, 1911, will be shown by the proof. By said contract the said J. W. Wright Jr. among other things agreed and obligated himself in substance and effect as follows, to wit:

116 1. That he would provide all equipment and perform all work for the completion of the constructing and building of

the said line of railway from Jackson, Tennessee to Dyersburg, Tennessee in accordance with the specifications made a part of the contract.

2. That the different branches of the work under the contract were included in one contract with the said J. W. Wright Jr. solely responsible for all work and men employed; and that the said J. W. Wright Jr. should not assign his said contract nor sublet or transfer the whole or any part or parts of the work under it to any other person or corporation (except for delivery of material) without the consent of the engineer of the Jackson Construction Company, in writing, but the said J. W. Wright Jr. would give his personal attention and superintendence of the work, and should not be released or discharged from any responsibility or liabilities under said contract owing to such assignees, subcontractors, or their agents, employees, or servants being allowed to engage in the work provided for under the contract.

3. That he, the said J. W. Wright Jr. would complete the work in six months from the date of the contract, delays occasioned wholly by the fault of the Jackson Construction Company not to be included in such six months period of time.

4. That upon notice given him the said J. W. Wright Jr. of the delivery of rails and all such material as might be delivered on the cars at Dyersburg or Jackson, that he, the said J. W. Wright Jr. should thereafter be liable for all charges and expenses of unloading, hauling, storage and demurrage incurred or accruing relative thereto.

117 5. That no estimates given or payments made under the said contract, except the final certificate or final payment should operate as conclusive evidence of the performance of said contract, either wholly or in part, and that no payment should be construed to be an acceptance of defective work or improper materials.

6. That he, the said J. W. Wright Jr., would give the Jackson Construction Company a good and sufficient bond to the amount of Fifty Thousand Dollars for the faithful*ly* carrying out and completion of his said contract.

7. That he, the said J. W. Wright Jr., would assume all re-s-onsibility for any loss or damage that might happen to the work he was to do under the contract or to the materials therefor or for any injury to the workmen or to the public, or to any individual, or for any damage to the Jackson Construction Company, or any parties' adjoining properties, and in case of accident and suit occur-ing on same, that he would defend the suit in person and relieve the Jackson Construction Company from all cost and expense and pay any judgment that might be recovered therein.

8. That if at any time there should be evidence of any liens of claims for which, if established, the Jackson Construction Company might become liable, or which were chargeable to the said J. W. Wright Jr., that the Jackson Construction Company should have the right to retain out of any payment then due or thereafter to

become due, an amount sufficient to completely indemnify the Jackson Construction Company against such liens or claims.

9. That final payment should be made subject to release after the completion and acceptance of the work included in said
118 contract; and that, the said J. W. Wright Jr. would furnish to the Jackson Construction Company, or its Engineer, if deemed necessary by its Engineer, all releases or waivers or liens, claims, or right of claims of said J. W. Wright Jr., and of subcontractors, and of all persons furnishing material or labor under said contract, who might have a lien therefor; and should there prove to be any such claim after the final payment was made, that he the said J. W. Wright Jr. would refund to the Jackson Construction Company all moneys that it might be compelled to pay in discharging any lien or claim on said railroad arising from work done thereon or material furnished under the said contract.

E.

It charges that on to wit: Nov. 14, 1911, the said contract of April 31*th*, 1911 was modified and amended by the said J. W. Wright Jr. and this cross complainant to the extent only as is evidenced by the amended and supplemental agreement of that date, of which exhibit "2" to the original bill is as previously admitted a true copy, and which was forced and obtained by the said J. W. Wright Jr. as previously stated in the preceeding answer of this cross complainant. By this amended and supplemental agreement the said J. W. Wright Jr. for a valid and legal consideration agreed and bound himself as therein recited, which said Exhibit "2" to the original bill is here and now referred to for a full and complete showing of the agreements and obligations made and assumed by the said J. W. Wright Jr., the same being already a part of the record in this cause, and therefore not necessary to be again copied and specifically set forth in this cross bill,
119 as by such reference thereto this cross complainant makes the statements therein appearing a part of this cross-bill as fully as if here and now repeated and set forth at length.

F.

It charges that thereafter as stated in the preceeding answer of this cross complainant, the said J. W. Wright Jr. on the — day of December 1911 was paid by this cross complainant the sum of $1,500.00 which was occasioned and made necessary for the reasons previously set forth in the preceeding answer of this cross complainant, and that thereupon the said J. W. Wright Jr. executed and delivered the receipt and agreement copied and set forth in the original bill filed by him in this cause, which said agteement of the said J. W. Wright Jr. was and is legally binding upon him and his administratrix as is shown by the preceding answer of this cross complainant, all of the facts stated in said answer being made a

part of the charges and allegations of this cross bill as fully as though here and now again repeated at length.

G.

It charges that notwithstanding the said contract and agreements of the said J. W. Wright Jr. that he unlawfully failed and refused to faithfully perform and carry out the same and thereby damaged cross complainant in an amount not now definitely known and cannot be definitely ascertained at this time, but according to information and belief this cross complainant charges that the damages sustained by it because of the said J. W. Wright Jr. having unlawfully breached his said contracts and agreements with it will amount to a very large amount and it accordingly sues for such damages to the amount of One Hundred Twenty Five Thousand Dollars.

120

Cross-complainant charges:

That the said J. W. Wright Jr. unlawfully failed and refused to provide all equipment and perform all work for the completion of the construction and building of the said line of railway from Jackson, Tennessee, to Dyersburg, Tennessee, in accordance with the specifications made a part of the contract, as he had solemnly obligated and bound himself to do, and thus unlawfully breached his contract with this cross-complainant.

That the said J. W. Wright Jr., notwithstanding the said contract, did assign and sublet, without the consent of the engineer of this cross complainant given in writing, a large part, if not all, of the work which by said contract he had made with this cross complainant, he had obligated himself to do; and further that the said J. W. Wright Jr. did not give his personal attention and superintendence to such work which under his said contract with this cross complainant he had obligated himself to do, but upon the contract of the said J. W. Wright Jr. only spent a small portion of his time in superintending said work, in violation of his said contract.

That the said J. W. Wright Jr. did not complete the work within the time specified in the said contracts and agreements and as a fact, before having ever completed the said work or having ever faithfully performed and carried out his said contracts and agreements, said J. W. Wright Jr. without lawful excuse, abandoned the work and said contracts and agreements and refused to further attempt to carry out and perform the same.

121

That the work which was performed by the said J. W. Wright Jr. and his subcontractors, agents and employes, in his attempted construction of said line of railway, wholly failed to come up to the contract and specifications; was not done in a workmanlike manner, but defectively and negligently done, so that the road bed, trestles, tract, etc. constructed, built or laid by the said J. W. Wright Jr., his agents, employess and subcontractors was wholly insufficient and unsuited for railroad purposes and was not first class in any particular; that the road bed was not cleared and embankments thrown

up as required by the contract and specifications, the depot grounds and sites for water stations were not prepared, highways and private ways were not cut down or raised as required; the stakes, after being set up by the engineer of cross complainant were removed and destroyed or lost in many instances, embankments were not constructed properly with material taken from the excavations, but stumps and trees were left in the right of way and brush, trash, logs and other unsuitable materials were used in making embankments, culverts and masonry work was not done in accordance with the specifications, the work being done in an unworkmanlike manner and defective material used; in filling of culverts, embankments were not carried up in layers of uniform depth so as to give a uniform pressure on the culvert; the excavations were not taken out with a 14 ft. base and slopes of one to one; embankments were not constructed with a 12 ft. crown and with 1½ to 1 slopes; spoil banks were not deposited nearer than ten feet of the slopes of the slope stakes; excavations were not taken out of the plane to a true measured prism; no ditches were made and provided as
122 required by the specifications; embankments were not stated at the base of the full width indicated by the slope stakes and built to the true slope without widening with the loose material from the top; the right of way was not cleared at least 50 ft. on each side of the center line where the right of way was 100 ft. in width or 25 ft. on each side of the center line where the right of way was fifty feet in width and trees, stumps, and undergrowth and brush within such clearing were not cut and removed as required by the specifications; roots, stumps and bushes were not removed as required, nor was the grubbing done in excavations under embankments in the manner provided in contract; the track was not laid in accordance with the specifications; track was not full tied; built and spiked with 2640 ties per mile, switches and sidings were not constructed as provided in the specifications, track was not brought within a line in accordance with centers, but the track was off centers in various and numerous places; ties were not brought to a perfect line on the line side nor laid as required by the specifications; ties were not properly spaced nor at right angles to the rails; nor was there proper elevation of the outer rail on curves; none of the track was properly surfaced nor ballasted as required by the contract and specifications, and in surfacing that portion of the track from Jackson to Bells which said J. W. Wright Jr. was obligated under his said contract to surface, material from the crown of the embankments and from the berms were taken in violation of his contract or agreement; steel shims for expansion as required were not used; the track was not dressed in accordance with the diagrams furnished; ditches were not left in uniform condition so that drainage would be unimpaired, no ditches at all being cut as required by specifications; nor was any part of said track laid upon a hard smooth surface in accordance with grade lines
123 established by the engineer, nor in such manner as to safely permit the operation of trains over and along said track from Bells to Dyersburg at a maximum speed of twenty miles per hour,

without injury to rails and equipment, and in a manner satisfactory to the chief engineer of this cross complainant; nor was said track first class in any particular; but all of the work performed or attempted to be performed by the said J. W. Wright Jr., his employees and subcontractors in the construction of said line of railway was improperly, recklessly and negligently performed, defective and insufficient, and failed utterly to comply with the contract and specifications for such work.

Cross complainant charges that it gave the said J. W. Wright Jr. notice of his failure to comply with the contract, and that it would be necessary for it, unless he proceeded at once to comply with his contract, to employ labor and take necessary steps to bring said work up to specifications, and to put the road in condition so that trains could be operated thereon, and the said J. W. Wright Jr. refused to further perform his said contract to the extent of making the same comply with the specifications and agreements made by him; and cross complainant by reason of the unlawful refusal and failure of the said J. W. Wright Jr. to fully perform and carry out his contract and agreements with it and by reason of the said J. W. Wright Jr. having without lawful excuse breached his said contract with it as aforesaid, was thereby forced and compelled to undertake to remedy the defects in said line of railway, which the said J. W. Wright Jr. permitted to continue and remain thus defective and not ac-
124 cording to contract after such notice given to him, and was thereby forced and compelled to undertake to have said line of railway otherwise completed and build and made to conform to the specifications and contract had between it and the said J. W. Wright Jr. as aforesaid; and by reason of the said breach of his contract with this cross complainant as aforesaid, the said J. W. Wright Jr. has caused and made cross complainant to pay out and expend many thousands of dollars for necessary work and labor which the said J. W. Wright Jr. was legally obligated to do or have done and which he failed and refused to do or have done, and become legally liable to others for many thousands of dollars on account of work and labor on said line of railway, done since the said J. W. Wright Jr. abandoned his contract with this cross complainant, which work and labor so done by others should have been done by the said J. W. Wright Jr. under his contract with this cross complainant as aforesaid, and was all made necessary and occasioned by the wrongful acts and conduct of the said J. W. Wright Jr. as aforesaid, and in addition to the expenditures already so made by this cross complainant and in addition to the liability already so incurred by this cross complainant to others, which it is legally bound for, and will have to pay for, this cross complainant will yet have to expend and become liable for many thousands of dollars, in order to complete said line of railway according to the contract it had with said J. W. Wright Jr., all of which expenditures and liability heretofore made and incurred and yet to be made and incurred by this cross complainant will be shown in the proof, both as to the amount and extent thereof, and how and in what manner the same was brought about and occasioned

by the wrongful acts and conduct of the said J. W. Wright Jr. as aforesaid.

125 Cross complainant further charges that the said J. W. Wright Jr. under his contract and agreement with this cross complainant was to be liable for all charges and expenses of unloading, hauling, storage and demurrage incurred or accruing upon notice given him of the delivery of rails and of such materials as might be delivered on the cars at Dyersburg and Jackson, and that this cross complainant did, as such rails and materials were delivered to it on cars at Dyersburg and Jackson, give notice of such fact to the said J. W. Wright Jr., but notwithstanding his obligation aforesaid, he failed to comply with his said contract, and this cross complainant was forced to and did pay between $900.00 and $1,000.00 as demurrage for and on account of said J. W. Wright Jr. an itemized statement of such expenditures and the amount thereof will be shown in the proof.

Cross complainant further charges that under the contract had with it, said J. W. Wright Jr. assumed all responsibility for injuries done in the construction of said railroad to other parties and adjoining properties, and that because of his failure to live up to and keep the said agreement, this cross complainant has already been forced to pay for and on account of said J. W. Wright Jr. approximately $1,000.00 to other persons in satisfaction of claims created and occasioned by the said J. W. Wright Jr., his agents, and sub-contractors, for all of which he was justly liable and which in some instances he admitted and requested this cross complainant to pay for him. An itemized statement of the amount so paid and to whom paid by this cross complainant will be shown in the proof. There are other claims and obligations against said J. W. Wright Jr. which have not been actually paid by this cross complainant, but

126 which in all probability it will be forced to pay off and discharge. The amount of which claims and the exact extent of this cross complainant's responsibility therefor, although primary liability therefor exists against the said J. W. Wright Jr. under his contract aforesaid with this cross complainant are not at present definitely known and cannot be stated, but the same will run up into thousands of dollars, and whatever amount this respondent may be compelled to pay out on said claims, it charges that it is entitled to recover same in this cause against the administratrix of the said J. W. Wright Jr., and to have set off and credit therefor against any indebtedness which may be found to be due by it to the said J. W. Wright Jr. or his said administratrix.

Cross complainant further charges that under its contract aforesaid with the said J. W. Wright Jr., he agreed that cross complainant should have the right to retain out of any payment then due or thereafter to become due, any amount sufficient to completely indemnify this cross complainant against any liens or claims for which, if established, it might become liable or which were chargeable to the said J. W. Wright Jr., and upon information and belief this cross complainant charges that a large amount of such claims now exist, aggregating thousands of dollars, all of which will be dis-

closed by the proof, and that under the said contract had with the said J. W. Wright Jr., it was and is entitled to retain out of any amount which may be found due by it to J. W. Wright Jr. or his administratrix, whatever liability may thus — established against it; and in the event that the same shall exceed any liability of this cross complainant to said J. W. Wright Jr. or his administratrix, that upon this cross complainant being forced to pay the same, is
127 entitled to a judgment over against the administratrix in this cause.

Cross complainant further charges that the said J. W. Wright Jr. failed and refused to give to this cross complainant a good and sufficient bond in the amount of $50,000.00 for the faithful carrying out and completion of his said contract as he obligated himself to do, and that because of his failure in said regard, this cross complainant is without adequate security to protect it for the damages sustained by reason of the said J. W. Wright Jr. having breached his said contract as foresaid.

Cross complainant further charges that under his contract aforesaid, said J. W. Wright Jr. agreed that final payment under the contract should be made subject to release after the completion and acceptance of the work included in said contract, and that there has been no final completion or acceptance of the said work; that the said J. W. Wright Jr. agreed that he would furnish to cross complainant or its engineer, if deemed necessary by its engineer, all releases or waivers or liens, claims or right of claims, of said J. W. Wright Jr. and of his sub-contractors, and of all persons furnishing material or labor under said contract as might have a lien therefor, and that said J. W. Wright Jr. has failed and refused to furnish such releases and waivers of liens, claims, etc. although the same were deemed necessary by its engineer, and that until such waivers and releases, etc. have been furnished, said J. W. Wright Jr. or his administratrix are not entitled — any recovery against this cross complainant and that for all such claims, liens, etc. that may be still existent, this cross complainant is entitled to have the same taken into account in any settlement decreed in this cause by the Court, and that the said J. W. Wright Jr. having agreed that he
128 would refund to this cross complainant all moneys that it might be compelled to pay in dischargeing any claim or lien on said railroad arising from work done thereon or material furnished under the said contract, that this cross complainant is entitled to a set off of all such claims and liens that may be shown to exist against it, arising out of said contract, and that where it has paid the same to a judgment over against the administratrix of the said J. W. Wright Jr.

H.

It charges that under the said contract and agreements had with the said J. W. Wright, Jr., this cross complainant has already paid to the said J. W. Wright, Jr., and deposited to his credit in Bank

under his direction and request, which money so deposited was thereafter checked out and used by the said J. W. Wright, Jr., at various and divers times, sums of money aggregating $117,756.83, which said amount so paid was largely in excess of what was actually due by this cross complainant to said J. W. Wright, Jr., and was brought about and caused to be paid by the fraud and deceit practiced on cross complainant by the said J. W. Wright, Jr., by his false representations and promises, relative to the carrying out of his said contract with this cross complainant, and also to a large extent by his collusion as aforesaid with Mike Harvey the former engineer of this cross complainant.

It charges, however, that under the express provisions of its contract with the said J. W. Wright, Jr., that it was mutually agreed that no estimates given or payments made under the contract,
129 either wholly or in part, and that no payment should be construed to be an acceptance of defective work or improper materials, and cross complainant charges that such payments made by it cannot now operate to stop it from showing that it has overpaid the said J. W. Wright, Jr., for everything done or had done by him under the said contract, and that for said overpayment it is entitled to a credit against any claim for work and services rendered by the said J. W. Wright, Jr., subsequent to the making of said payments, and to a judgment over against his administratrix for any excess appearing after making and applying such overpayments as a credit on work and services subsequent to said payments performed and rendered by the said J. W. Wright, Jr.

I.

It charges that at the instance and request of said J. W. Wright, Jr., it purchased, paid for, and delivered to him, four cars at the aggregate price of $640.00 together with freight charges thereon, amounting to $21.60, and that said cars were purchased and delivered to the said J. W. Wright, Jr., in order to enable him to carry out his said contract with cross complainant and were so used by him in furtherance of his work under the contract. It further charges that at the instance and request of the said J. W. Wright, Jr., it bought, paid for and delivered coal to him of the aggregate value of $395.74, together with freight charges thereon of $317.98, and also at his instance and request it paid for repairs to cars $10.44; and that these said expenditures were all brought about by reason of its contract with said J. W. Wright, Jr., and were at his instance and request made by cross complainant and that it is now entitled
130 to a credit for same against any claim which may be established against it in this cause, and for a judgment over in the event it should appear upon a taking of accounts that when all such credits are allowed a balance is due it by the said J. W. Wright, Jr., likewise it charges that for and on account of the said J. W. Wright, Jr., and at his instance and request, it paid out for the said J. W. Wright, Jr., at sundry times, the following amounts to wit:

$25.20	to	John Rose,
10.00	"	C. R. Elliot,
43.32	"	J. W. Anderton,
5.40	"	R. M. Hall,
9.60	"	Duffey & Sharp,
5.00	"	S. L. Sherrod,
561.74	"	W. E. Nichol,
3.00	for	lumber
.25	"	telephone
$663.51	total.	

And that each and all of said expenditures are proper items of credit to it upon a settlement between it and the said J. W. Wright, Jr., the same having been brought about by reason of its contract with him, and having been made at his instance.

J.

It further charges that the said J. W. Wright, Jr., is further justly indebted to it for and on account of the following matters, to wit:

Cross complainant at the instance and request of the said J. W. Wright, Jr., furnished to him a locomotive with which to carry on the work he had contracted to do, which it had rented from the N. C. & St. L. Ry. Co., and while the said J. W. Wright, Jr., had the same in his possession and under his control through his agents and employes, the said engine was so badly damaged that it was
131 rendered not fit for further service, and thereupon the said J. W. Wright, Jr., returned said engine to cross complainant and agreed to pay the damage, which he was already obligated without such agreement to pay, and this cross complainant was forced to pay and did pay the sum of $240.74 to have said damaged engine repaired, which was the fair and reasonable expense of said necessary repairs to said engine, brought about by the fault of the said J. W. Wright Jr.

Likewise another locomotive furnished by this cross complainant to said J. W. Wright, Jr., at his instance and request for the purpose of carrying on the work he had contracted to do, was badly damaged by the said J. W. Wright, Jr., his agents, employees and those for whose acts and conduct he was responsible, by their careless, negligent and improper use of the same, as that this cross complainant sustained and suffered a loss thereby to the extent of $500.00 likewise the said J. W. Wright, Jr., through his careless, negligent and wrongful acts and conduct, and the careless negligent and wrongful acts and conduct of his agents, employees, and those for whose acts and conduct he was responsible, caused this cross complainant to be damaged to the extent of $1302.17 because of the destruction of two box cars which were burned and which amount this cross complainant was made legally responsible to the owners thereof by reason of said wrongful, negligent and careless acts and conduct of the said J. W. Wright, Jr., his agents, servants, employees and those for whose

acts and conduct he was legally responsible; said two cars having gone into the possession and under the *contract* of said J. W. Wright, Jr., his agents, servants, and employees under and by reason of the
132 contracts and agreements aforesaid existing between him and this cross complainant. Likewise, four other cars so received by the said J. W. Wright, Jr., were also damaged to the extent of $200.00 and nineteen other cars so received by the said J. W. Wright, Jr., were damaged to the extent of $1000.00; all of which damage was occasioned and brought about by the careless, negligent and wrongful acts and conduct of the said J. W. Wright, Jr., his agents, servants, employees and persons for whose acts and conduct he was legally responsible, and for which damage this respondent was made to suffer, because of its having turned over the temporary possession and control of same to the said J. W. Wright, Jr., in furtherance of its said contract and agreement with him.

K.

It charges that the said J. W. Wright, Jr., was and is justly indebted to it in the sum of $400.00 rent of two engines furnished by it to the said J. W. Wright, Jr., at his instance and request, prior to the making of the amended and supplemental agreement of November 14, 1911, said engines having been furnished said J. W. Wright, Jr., to enable him to do the work and services which he had contracted to do and which engines he had used for a period of forty days prior to November 14, 1911, and that a reasonable rent for said engines during said period of time was the sum or $10.00 a day, and for which rental of said engines the said J. W. Wright, Jr., has never paid this cross complainant, although legally bound and obligated so to do.

Likewise, the said J. W. Wright, Jr., is justly indebted to this complainant in the sum of $180.00 as rent for two engines furnished to him by this cross complainant pursuant to the supplemental agree-
133 ment of Nov. 14, 1911, wherein he agreed to pay this cross complainant $1.00 per day for each of said locomotives until same were returned to this cross complainant, said locomotives being so held and not returned for a period of ninety days.

L.

It charges that the said J. W. Wright Jr. unlawfully breached the supplemental agreement of Nov. 14th, 1911, heretofore referred to relative to the use of said two locomotives and 15 flat cars that were to be furnished by this cross complainant to be used by him in the hauling of rails and other material in the performance of said amended contract, the expense and cost of operating said locomotive- and cars and all repairs to same being agreed by the said J. W. Wright Jr. to be borne by him and he obligating himself to keep said locomotives and cars in repair and return same in as good condition and repair as they were at the date furnished. Cross complainant charges that the said J. W. Wright Jr. did not return to

it the said locomotives and cars in as good condition as they were at the date furnished him, nor did he pay and bear the expense and cost of operating said locomotives and cars and all repairs to same, as he had contracted to do, nor did he pay to this cross complainant the sum of $1.00 per day for the use of each of said locomotives until the same were returned to this cross complainant, and that by reason of the said breach of the contract and agreement by the said J. W. Wright Jr. this cross complainant has been damaged in the approximate sum of $5,000.00.

It further charges that the aforesaid breach of his contract by the said J. W. Wright Jr. and his negligent, careless, and reckless use and care of the engines and cars which were furnished to
134 him by this cross complainant, and which it permitted him to use, relieved this cross complainant of a*h*y obligation under the amended agreement of November 14, 1911, whereby it agreed to allow the said J. W. Wright Jr. the use of two locomotives and 15 flat cars to be used in the hauling of rail and other material in the performance of said amended contract.

M.

It further charges that the said J. W. Wright Jr. is justly indebted to it for the reasonable rent of four box cars which it furnished and permitted the said J. W. Wright Jr. to use for a period of about five months while he was engaged in attempting to perform his said contract with this cross complainant, and which use of said box cars by the said J. W. Wright Jr., his agents, servants, employees, and sub-contractors was in and about the work, labor and services of constructing said line of railway from Jackson to Dyersburg, Tennessee, and the reasonable value of the said use of said cars for said period of time was to wit: the sum of $600.00.

N.

It further charges that it is entitled to recover of said J. W. Wright Jr. and his administratrix in this cause the sum of $100.00 per day as l*u*quidated damages, because of the unlawful breach by the said J. W. Wright Jr. of his contract and agreement of Nov. 14, 1911, wherein he obligated himself to lay the track on said line of railway from Bells to Dyersburg, Tennessee in accordance with the stipulations and specifications referred to, and to
135 have the same fully completed in accordance therewith on or before the expiration of 60 working days from the said date of Nov. 14, 1911. Not only did the said J. W. Wright Jr. unlawfully fail and refuse to complete the said line of railway from Bells to Dyersburg, Tennessee within 60 days as contracted, but he abandoned and refused to even attempt to carry out his said contract and by reason of his unlawful refusal and failure to comply with his said agreement and contract. it was about five months beyond the sixty days' time stipulated that said line of railway was gotten into shape to enable trains to be run with safety from

Bells to Dyersburg, Tennessee, although this cross complainant did every reasonable thing within its power to put said line of railway expeditiously in a condition to safely permit the operation of trains thereover from Bells to Dyersburg, Tennessee, and by reason of his said contract in said regard, this cross complainant has suffered loss and damage to wit: $15,000.00 for all of which it asks judgment and that the same be set off against any claim asserted against it in this cause by the said J. W. Wright Jr. or his administratrix.

O.

It charges that on the — day of December, 1911, the said J. W. Wright Jr. in consideration of the sum of $15,000.00 then received by him from this cross complainant, not only agreed that he would ask no additional payment on account of the building of said railroad until the completion of his contract, but further agreed that he would hold the Jackson Construction Company, Birmingham & Northwestern Railway Co., and R. M. Hall, Harmless and free from liability from any claim contracted by him with his sub-
136 contractors; but notwithstanding said agreement which was then and there binding upon the said J. W. Wright Jr. and has all along continued to be binding upon him, he has wholly failed and refused to hold this cross complainant harmless from such claims, but upon the contrary he has, by his wrongful acts and conduct as aforesaid, and by false statements and charges caused this cross complainant to be *used* by such claimants and has caused it to pay out large sums of money in defense of said litigation, and has caused it to pay and otherwise assume liability for a large amount of such claims and to otherwise be made responsible and legally liable for a large number of claims to subcontractors of the said J. W. Wright Jr., all of which claims the said J. W. Wright Jr. is and was obligated to pay off and hold this cross complainant harmless as to same.

By reason of his said unlawful breach of his contract and agreement as aforesaid the said J. W. Wright Jr. has caused this cross complainant to suffer and sustain great loss and damage, the exact amount of which cannot now be definitely stated, but will be shown by the proof, and for whatever amount may be so shown by the proof this cross complainant asks that it be fully indemnified and protected by a recovery therefor against the said J. W. Wright Jr. and his administratrix and a taking of the same into account as a set off and credit against any demand asserted by the said J. W. Wright Jr. and his administratrix against it in this cause.

P.

It charges upon advice, information and belief, that upon the foregoing showing of facts, *as* respondent and cross com-
137 plainant is entitled to have the said Susie E. Wright, as administratrix of J. W. Wright Jr. brought before the Court in the capacity of cross defendant to this answer, filed as a cross

bill, and upon final hearing to have the Court take into consideration all damages sustained by this cross complainant because of the wrongful acts and conduct of the said J. W. Wright, Jr. in unlawfully breaching his contract and agreements had with this cross complainant as well as all claims it has against the said J. W. Wright Jr. as aforesaid, and that all damages so sustained by this cross complainant as well as all payment made by it to said J. W. Wright Jr. and to others, on his account, and at his instance and request, as well also all claims it has against the said J. W. Wright Jr. as aforesaid, be set off and abutted against any and all claims asserted against it in this cause by the said J. W. Wright Jr. and his administratrix, Susie E. Wright; and that should it appear upon the final hearing and taking of proof that this cross complainant is entitled to any affirmative relief against said J. W. Wright, Jr. and his administratrix, that a decree should be rendered in its favor for whatever is thus shown to be due it.

Premises considered, complainant prays that it be permitted to file its answer and cross bill in this cause as above set forth, and that all proper process issue and be be made, necessary to bring the said Susie E. Writht, as administratrix of J. W. Wright Jr. before the Court as a cross defendant, and as such cross defendant, that she be required to answer this cross bill, but not under oath, as the oath to such answer is hereby expressly waived.

Second. That this cross complainant be allowed credit for all matters hereinbefore set up as may properly be shown under the pleadings and proof in this cause, against any claims which may be asserted against it by the said Susie E. Wright as ad-
138 ministratrix of J. W. Wright Jr., and if any excess be found due it, after allowing all proper credits, that a judgment be rendered against said administratrix for whatever amount is found to be due this cross complainant under the pleadings and proof in this cause.

Third. That it have all, such other, further, general and different relief as it may appear to be justly entitled upon final hearing.

W. G. TIMBERLAKE,
Solicitor for Jackson Construction Co.

139 *Answer of B. & N. W. Ry. Co.*

Filed July 14, 1913.

J. W. WRIGHT, JR.,

VS.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY et al.

Answer of the Defendant Birmingham & Northwestern Railway Company to the original, amended, and supplemental bills filed in this cause by the complainant, J. W. Wright, Jr., and which cause has been revived in the name of Susie E. Wright, executrix.

This defendant answering so much and such parts of the said original, amended and supplemental bills as were not dismissed on demurrer and as it is required to answer, or as it deems material for it to answer, says:

I.

For answer to the allegations of the first paragraph of the original bill this defendant admits that it was incorporated under the laws of the State of Tennessee in August, 1910, for the purpose of constructing and operating a railway from the City of Jackson to Dyersburg, Tennessee, with an authorized capital stock of $300,000.00, and that its charter was duly registered as required by law; that in building and constructing said railway it was necessary to construct and build embankments, fills, cuts, culverts, trestles, lay ties, rails and other work necessary in the construction of a railway, including main line, switches and terminals. And defendant states that not only
140 was it necessary that said construction work be done, but essential for the safe and successful operation of said railroads that said work be done properly and in a workmanlike manner.

The allegation to the effect that only a very small portion of the defendant's capital stock was actually issued or paid for bona fide, is denied. It is admitted that the Jackson Construction Company was also incorporated under the laws of Tennessee about the date alleged, with an authorized capital of $5,000.00, and its charter was duly registered, but it is denied that only a very small portion of its stock was issued, or that the complainant had any such information.

It is admitted that the purpose of the incorporation of the Jackson Construction Company was for the purpose of constructing and building railroads, etc., as alleged in the bill; that R. M. Hall was the President of the Jackson Construction Company, but it is denied that said R. M. Hall was president of this defendant at the time of the filing of the complainant's bill or at the time of the transactions mentioned in the complainant's bills. The complainant and his solicitors knew or had notice at the time complainant's bill was filed that R. M. Hall was not the President of the defendant. The allegations appearing in the first paragraph of complainant's original bill to the effect that both of said corporations were promoting schemes by it was sought to acquire for the Railway Company rights of way, subscriptions, donations and bonds and then contract with the Construction Company to build the said railroad based on the subscription and that the public was expected to finance the two concerns, are untrue and known to have been untrue when made, and are emphatically denied by the defendant.

141 II.

This defendant admits that in April, 1911, it contracted with its co-defendant, Jackson Construction Company to construct its line of railway from Jackson to Dyersburg in said State; and it shows that said contract was in writing, and by its terms and provisions, the said

Jackson Construction Company was, among other things, required to procure rights of way and to construct the proposed line of railroad, and to furnish all labor and material necessary for the building, construction and equipping of said railroad, its depots, tanks, bridges, etc., all for the consideration recited in said contract, one of the original copies of which said contract will be introduced in evidence and read at the hearing. Said contract further provided that said construction work was to be performed in accordance with the specifications of the Chief Engineer of the Company, which said specifications were duly prepared, and with reference to the manner in which said construction work was to be performed and the details and requirements thereof, were substantially in keeping with the specifications constituting a part of the alleged contract between the Jackson Construction Company and the Complainant, J. W. Wright, Jr., as set forth in the copy filed as a part of Exhibit "A" to the complainant's original bill. A true copy of said specifications will be introduced in evidence and read at the hearing, should the same become material.

Defendant denies that it was necessary for it to acquire rights of way at least one hundred feet, as its right of way through some of the lands along the route is only fifty feet in width; but defendant states that its right of way from Jackson to Dyersburg has been acquired and it is in the possession and use of same. It is denied that there has been any delay caused the complainant, J. W.
142 Wright, Jr., by reason of any delay in securing rights of way.

III.

This defendant admits that the complainant, J. W. Wright, Jr., entered into a contract with the said Jackson Construction Company by which the said J. W. Wright, Jr., undertook and agreed to perform the work of constructing said line of railroad, side tracks depot sites, bridges, etc., but it is denied that "Exhibit A" to the complainant's bill is a true copy of said contract.

It is admitted that the said J. W. Wright, Jr., under his said contract with the Jackson Construction Company was obligated to perform certain work and labor and in the manner as required by the specifications made a part of said contract; and defendant states that all of said work was to be performed in the manner and in accordance with said specifications; that it was the intention and agreement that said railroad track should be first class in every particular, and the specifications so provided; that said J. W. Wright, Jr., knew for what purpose said work was being done and was intended, and he was required by his said contract and the specifications to do and perform said work according to good practice in railroad construction work and in a workmanlike manner, and so as to prepare said railroad for operating passenger and freight trains thereon with safety to passengers, freight and equipment; that, as appears from the said contracts and specifications, it was the intention to obtain a completed railroad to enable this defendant to carry on its business as a common carrier, and the said J. W. Wright, Jr., well knew that said work

143 would be useless to this defendant unless said railroad be properly constructed and put in such condition that trains could be operated with safety thereon.

This defendant is advised that it is not required to answer such parts of the allegations of complainant's bills as purport to set up alleged delays and damages claimed on that account by complainant; but this defendant states upon information and belief, that on account of the neglect of the said J. W. Wright, Jr., and his employees, and his failure to keep the required number of men and teams at work on said railroad, and his abandonment of the work and breaches of contract, damage to equipment, and unskillfulness, the Jackson Construction Company was delayed in the completion of said work and damaged in a large sum, and that on account of such delays caused by the fault and neglect of said J. W. Wright, Jr., this defendant also has suffered damage in a large sum.

IV.

This defendant is advised that it is not required to answer the allegations of said bills relative to the guaranty executed by said R. M. Hall.

It is emphatically denied that the said J. W. Wright, Jr., proceeded to perform the work in accordance with the contract and specifications; it is denied that he performed any of the work mentioned in the fourth paragraph of his original bill in accordance with the contract and specifications; it is denied that any of said work was completed by him; and it is denied that any kind of said work was done and performed in a proper and workmanlike manner.

As to the allegations of the *court* paragraph of said bill relative to obstructions thrown in the way of the said Contractor, this
144 defendant is advised that it is not required to answer same, but, if the said allegations should become material to the rights of this defendant, the same are denied. Defendant shows that it was its desire that said railroad be completed at the earliest practicable date, and there existed no reason or motive for hindering, obstructing or delaying the said contractor in his work. Defendant further states, upon information and belief, that the said contractor, J. W. Wright, Jr., neglected his work, failed to give the same his personal attention or to keep a competent man on the work at all times, but sub-let the greater portion of said construction work to other parties, while the said J. W. Wright, Jr., spent most of his time in Jackson and out of the State and in looking after his construction work elsewhere.

Defendant shows that after the letting of said contract to J. W. Wright, Jr., by the Jackson Construction Company for the construction of said railroad, the said J. W. Wright, Jr., thereupon entered into contracts with various independent contractors for performing specific portions of said work; that he sublet to certain independent contractors the building and construction of certain parts of said line of railroad in Madison County Tennessee, and to other sub-contractors the building and con-

struction of certain parts of said line of railroad in Dyer County; and other subcontractors the building and construction of certain parts of said line of railroad in Crockett County; that the said J. W. Wright, Jr., failed and neglected to furnish to said subcontractors proper specifications for the performance of the work allotted to them, and failed and neglected to properly superintend their work and to have the same properly done; that all the
145 work done or performed by said subcontractors was prior to the — day of November, 1911, no work being performed by any of them after said date, their work up to said date being accepted by said J. W. Wright, Jr., as completed, insofar as they were required to complete the same, altho' the said J. W. Wright, Jr., know or should have known that the portions of the work so accepted by him were not done or completed in accordance with his contract with the Jackson Construction Company and the specifications thereof.

It is admitted that on or about the 14th day of November, 1911, a supplemental contract was entered into by and between the said J. W. Wright Jr., and the Jackson Construction Company by which some of the terms and provisions of said contract of April 13th, 1911, were amended and modified and certain changes made, and certain claims for damages and for extra work and services waived or settled, and that the copy of said supplemental agreement filed as "Exhibit 2" to the complainant's bill is substantially correct. It is admitted that according to said supplemental agreement the said J. W. Wright Jr. was released from surfacing the track from Bells to Dyersburg and that instead of being paid $625.00 per mile for a completely surfaced track, the said Wright was to receive $550.00 per mile, but in all other respects the said Wright was required to carry out and perform his original contract as well as the provisions of said supplemental agreement; the second paragraph of said supplemental contract being as follows:

"In consideration of being released from such final surfacing, said track of the railroad from the town of Bells to Dyersburg, Tennessee, the contractor agrees and obligates himself to load and unload and haul and deliver at his own expense, all rails, ties and other
146 material for the track-laying and to lay the track and rails in accordance with the provisions of said contract and specifications for the sum of Five hundred and twenty-five dollars ($525.00) per mile instead of six hundred and twenty-five dollars ($625.00) per mile, as provided in said original contract; the contractor agreeing to receive, take up and haul, without additional charge to the Company, all ties, which or now, or may be delivered, or piled on or near the railroad right of way; the said track to be laid with the rails already furnished and delivered to the contractor by the company, and the track to be fully tied, bolted and spiked with 2640 ties per mile (ties to be uniform distance apart) together with such switches and sidings and railroad crossing as may be decided upon; the track to be brought to a perfect line in accordance with centers as given by the Company's engineer; ties to be brought to a perfect line on the line side (south side) or tangents, and on

curves the lines shall be transferred to the outer side of curves; all ties shall be accurately spaced and to be at right angles with rails. The elevation of the outer rail on curve shall be directed by the Engineer; the said track shall be laid upon a hard, smooth surface, in accordance with the grade line established by the Engineer, and in such a manner as to safely permit the operation of trains over and along said track from Bells to Dyersburg at a maximum speed of twenty miles (20) per hour, without injury to the rails or equipment in a manner satisfactory to the Chief Engineer of the Company; the intention being to obtain a first class track in every particular, with the exception of the final surfacing from which the contractor is released."

147 This defendant denies the allegations of the complainant's bill to the effect that the said J. W. Wright, Jr., has done work and labor in accordance with said contract; it denies that he has laid the track to within 6¾ miles of Dyersburg, as a railroad track is not laid until it is properly laid, and the track laid by the said J. W. Wright Jr., especially that portion northwest of Bells, was not only not laid in accordance with the said contracts and specifications but was laid in such a negligent and improper manner as to be unsuitable for even an ordinary log road. It is denied that said Wright has done the kind and character of work required by the said contracts and specifications.

As to all other allegations of the fifth paragraph of the complainant's original bill, this defendant is advised that it is not required to make answer thereto.

VI.

Answering the allegations of the Sixth paragraph of the complainant's original bill, in so far as this defendant is required to answer same, it is denied that either the Jackson Construction Company or R. M. Hall are indebted to the complainant for work and labor done by J. W. Wright Jr., his subcontractors, agents or employees. On the contrary this defendand is advised and believes and so states the fact to be that the Jackson Construction Company has paid the said Wright largely more than he was entitled to receive for the amount of work performed on said railroad and that said Wright is indebted to the Jackson Construction Company for over-payments and damages in the sum of Several thousand dollars.

148 It is admitted that the said J. W. Wright Jr., signed the contract of date — day of December, 1911, by which he agreed, upon the payment to him of $15,000.00, not to ask for any additional payments on account of building said railroad until the completion of his said contract, and that he would hold the Jackson Construction Company, R. M. Hall, and this defendant harmless and free from any claims contracted by said Wright with his subcontractors. This defendant states, upon information and belief, that the circumstances of the payment of said $15,000.00 to the said Wright and the signing of said receipt were as follows: After entering into said supplemental contract of November 14th 1911, the said

J. W. Wright Jr., again set his forces to work on the construction of said railroad but continued the work for only a short time, towit, until about the — day of December, 1911, when he again refused to go on with the work unless the additional sum of $15,000.00 be advanced to him forthwith, at said time there were a number of subcontractors under said Wright who were clamoring for money which they alleged that Wright owed them for work on said road, but the said Wright was refusing to pay them, stating that he was out of funds. He was then fully advised that he had already been overpaid for the work performed and that nothing was due him, which the said Wright well knew, but the Jackson Construction Company as well as this defendant being anxious to have the work on said railroad completed before the bad weather set in, and relying on the promises of said Wright that, if the said sum of $15,000.00 be advanced to him, he would pay off his subcontractors and at once proceed to complete said road, and would not ask for any further payment until the road was finally completed, the Jackson Construction Company advanced the sum of $15,000.00 to
149 said Wright and took his receipt therefor, a copy of which is set out in the complainant's bill. The allegation that there was no consideration for said receipt and the agreement on the part of said J. W. Wright Jr., as therein shown, and that the same was forced from him by the defendants, or either of them, are untrue and therefore denied.

This defendant states, upon information and belief, that the monies which were paid or advanced to the said J. W. Wright, Jr., from time to time by the Jackson Construction Company, were not used and applied by him altogether in paying for the work and labor on said railroad, but a large portion of said funds was used by him in financing and promoting his construction work elsewhere, and for other purposes.

VII.

With reference to the allegations of the Seventh paragraph of the complainant's original bill, this defendant is advised that it is not required to answer same, but should said allegations become material to the rights of this defendant the same are denied. It is admitted that the said J. W. Wright Jr., left a 175 foot opening in the roadbed of said railroad, but this defendant states that it was the duty of said J. W. Wright Jr., to fill in said opening and to build the roadbed and track at said place, and that it was wholly the fault and neglect of said Wright that said work was not performed.

VIII.

Answering the allegation of the Eighth paragraph of said original bill insofar as this defendant is required to answer the same, and insofar as the allegations thereof are deemed material, defendant says:

150 It denies that on or about the 14th day of March, 1912, the complainant, J. W. Wright, Jr., gave notice to it in writing specifying the character of the work and labor done and services rendered and material furnished and the value thereof, it denies that the said Wright, within ninety days after any such work and labor was done or completed or services rendered notified this defendant in writing that he claimed a lien, on this defendant's railroad or property, in which notice he specified the character of the work and labor done or services rendered or materials furnished and the value thereof. While the said Wright on or about said date served some kind of notice on Jno. L. Wisdom as President of this defendant, yet it is denied that the alleged notice was given or served within ninety days of the performance or rendering of the alleged services or work and labor; it is denied that the alleged notice set out the character of the work and labor done or services rendered or the value thereof; it is denied that any such notice was given and would entitle the complainant to a lien on the railroad and property of this defendant; it is denied that any notice was given in accordance with the provisions and requirements of the law in such cases made and provided; it is denied that the complainant has any lien on the railroad and property of this defendant for any balance that may be due and owing to complainant or that complainant may be entitled to recover from the Jackson Construction Company or for the value of the alleged work and labor; it is denied that complainant is entitled to recover any sum either from this defendant or from the Jackson Construction Company; it is denied that anything is owing to the complainant for the alleged work and labor and services.

151 IX.

Answering the allegations of the Ninth paragraph of complainant's original bill, in so far as this defendant is required to answer same, it says: It denies that either the Jackson Construction Company or K. M. Hall are indebted to the complainant in the sum of $59,029.84, or in any amount whatever, for work and labor and services, etc., performed in the construction of this defendant's railroad; it is denied that any sum whatever is due the complainant for alleged work and labor and services, but, as this defendant is advised and believes the complainant has already been overpaid, as will be hereinafter more fully shown.

X.

Answering the allegations of the Eleventh paragraph of said bill defendant denies that the defendants or either of them, are indebted to the complainant, and that complainant has a lien on this defendant's railroad or any of its property; it is denied that this defendant has or is enjoying any of the fruits of the labor of the said J. W. Wright, Jr., for which he has not already been paid, and in fact overpaid; and it is emphatically denied that the prices set out for the work and labor alleged to have been performed by said Wright are

reasonable; and it is denied that complainant is entitled to recover in assumpsit or of a quantum meruit for work and labor and services performed; it is denied that the value of the alleged work and labor and services is as much as the said Wright has already been paid.

This defendant avers that the said J. W. Wright, Jr.,
152 wholly failed and refused to carry out and perform his said contract with the Jackson Construction Company; that the work performed by him wholly failed to conform to the said contracts and specifications, was not performed in a workmanlike manner, but defectively and negligently done so that the road-bed, trestles, track, etc., constructed, built or laid by said J. W. Wright, Jr., his employees and sub-contractors was wholly insufficient and unsuited for railroad purposes and was not first class in any particular; that road-bed was not graded and embankments thrown up as required by the contract and specifications; the depot grounds and sites for water stations were not prepared; highways and private ways were not cut down or raised as required; embankments were not constructed properly with material taken from the excavations, but stumps of trees were left in the right of way and brush, trash, logs, and other unsuitable materials were used in making embankments, culverts and masonry work was not done in accordance with the specifications in that defective material was used and the work was not done in a workmanlike manner; and in filling over culverts the embankments were not carried up in layers of uniform depth; so as to give a uniform pressure on the culverts; excavations were not taken out with a 14 foot base and slope of one to one; the embankments were not constructed with a twelve foot crown nor with one and one-half to one slopes; no ditches were made as required by the specifications; embankments were not started at the base of the full width indicated by the slope stakes and built to the true slope without widening with loose materials from the top; the right of way was not cleared at least fifty-feet on each side of the center line where the right of way is one hundred feet wide nor at least twenty-five feet on each side of the center line where the right of way is fifty feet wide, and trees,
153 stumps, undergrowth and brush in the right of way were not cut and removed as required by the specifications; grubbing was not done in excavations under embankments in the manner as required; the track was not laid properly; was not full tied, bolted and spiked; with 2,640 ties per mile; switches and sidings were not constructed as provided in specifications; the track was not lined in accordance with centers; ties were not brought to a line on the line side nor as required by the specifications and contract; ties were not uniformly and properly spaced nor at right angles to the rails; nor was there proper elevation of the outer rail on curves; none of the track was properly surfaced nor ballasted; and in attempting to surface the track the said Wright and his employees robbed the crown of the embankments and the berm; steel shims were not furnished by the contractor as he was required; the track was not dressed in accordance with the diagrams furnished, ditches were not left in uniform condition so that drainage would be unimpaired, no ditches at all being cut as required by the specifications; nor was any part of

the said track laid upon a hard, smooth surface in accordance with grade lines established by the engineer, nor in such manner as to safely permit the operation of trains over and along said track from Bells to Dyersburg at a maximum speed of twenty miles per hour without injury to the rails and equipment; nor was said track first class in every particular; but practically all of the work performed or attempted to be performed by the said J. W. Wright, Jr., was improperly, recklessly and negligently performed, defective and insufficient, and failed utterly to comply with the said contract and specifications. Said railroad was left by the contract- in such an in-
154 complete, dangerous and unsafe condition that the Jackson Construction Company and this defendant were compelled to employ labor and spend large sums of money in order to put the road in condition so that same could be used for the purpose for which it was intended; that said railroad, as constructed by said Wright, his agents, subcontractors and employers, was unsuitable for railroad purposes. As this defendant is advised and believes and so avers, the said Wright has already been paid largely more than the value of any services performed by him, his employees and subcontractors.

XI.

This defendant further avers, upon information and belief, that the complainant's said claim for balance alleged to be due for work and labor and damages was not made in good faith, as the said Wright well knew that he had not carried out his contract with the Jackson Construction Company and that he had received advance payments largely in excess of what he was entitled to received, and that he was indebted to the Jackson Construction Company on account — and for damages caused by his delays and negligence. And defendant further avers upon information and belief that it was never the intention of said J. W. Wright, Jr., to fully carry out and perform his said contract with the said Jackson Construction Company, but, as manifested by his threats and conduct, it was his purpose, intention and scheme from the very outset to ignore his said contract and specifications, to cover as much ground as possible without undertaking to finish the work in order to increase the yardage and estimates, and to secure as much money as possible on such estimates and otherwise, and finally abandon the work altogether which he did, and thereupon undertook to force the payment of
155 trumped-up claims for alleged balances and damages by blackmail, coercion, threats and efforts to force this defendant and the Jackson Construction Company into the hands of a receiver filing bills in Chancery containing false and reckless allegations, undertaking to bring into the case his own creditors in order to have them assert liens, and finally resorting to the reprehensible and ill-advised act of libeling defendants in a newspaper advertising his said suit and the names of his solicitors with the intent, purpose and design that all the creditors of defendants would immediately send in their claims and join said Wright in his efforts to bankrupt the defendants.

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And defendant further avers, upon information and belief, that the said Wright in furtherance of his scheme to defraud corrupted or intimidated the Chief Engineer of the Company and probably some of the resident engineers, and that there existed collusion between said contractor and one Mike Harvey, the Chief Engineer of the Company; that as a result of or springing out of said intimidation or collusive arrangement, or both, grossly excessive and incorrect estimat-s of work and yardage were prepared, or approved by said Engineer, and the said Wright was enabled thereby to obtain advances based upon said excessive and incorrect estimates; that each and every one of the estimates prepared and approved by said Engineer and on which said Wright received advance payments, were grossly excessive and incorrect; that whether or not ther- existed collusion or intimidation, said estimates were so grossly excessive and incorrect as to amount to fraud or gross mistake and neither the Jackson Construction Company nor this defendant are bound thereby. That on account of said collusion existing between the said contractor and the Chief Engineer, or because of the intimidation and coercion exercised by said contractor over him, the said
156 Engineer undertook to approve and authorize excessive and fictitious claims for force-account, extra work and services for which said Wright received advance payments and credits to which he is not entitled. That said estimates, however, were not intended and did not amount to an ecceptance of any part of the work and were not final. That as soon as the defendants became convinced of the collusion exitsing between the Chief Engineer and said contractor, to wit, on or about November —, 1911, the said Engineer was discharged and thereafter said Wright was notified that previous estimates were excessive and that he had been overpaid.

XIII.

This defendant further avers, upon information and belief, that there was paid or advanced to said J. W. Wright, Jr., on said excessive estimates the sum of about $95,756.83. And in addition there were advanced to said J. W. Wright, Jr., from time to time, at his request, the following sums, to wit: $2000.00, $5000.00, and $15,000.00, making a total of $22,000.00; all of which sums of money were either paid to said Wright in person or at his instance deposited to his credit in Bank and thereafter checked out by him; that in addition to said payments or advances, the Jackson Construction Company has paid out on account of said Wright and at his instance and request and for his benefit and for property and coal used by said Wright and for car service, the sum of about $3023.65, and for repairs to property damaged by said Wright or his employees and in payment for extra work and labor in an effort to construct and complete said railroad as the said Wright had contracted to do, a total of over $4500.00; making a total debts on account

157 of J. W. Wright, Jr., with the Jackson Construction Company of over $125,230.00, money actually paid out on account of said J. W. Wright, Jr.; that the said Jackson Construction Company further has a large claim for damages against said contractor for delays, damages and equipment, material, etc.;—and that upon a final accounting between the Jackson Construction Company and complainant, it will appear that said Wright is indebted to the Jackson Construction Company in a sum largely in excess of the amount chargeable against the Jackson Construction Company for labor and services rendered by said J. W. Wright, Jr.

And this defendant further shows that the said Wright and the said Jackson Construction Company having failed to complete said railroad in accordance with their contracts and the specifications, this defendant finally in —— 1912, took charge of said railroad in its uncompleted condition and proceeded to carry on the construction work in the effort to complete the road according to the specifications, repairing and the defects, enlarging the embankments and cuts, digging ditches, driving piles for trestles, building culverts and cattle guards, and other work which the said Wright and the Jackson Construction Company were obligated to do and perform, and that this defendant has paid out for work and labor for said purposes the sum of about $36,000.00, and yet said railroad is still in an incomplete condition.

And defendant further states, upon information and belief, that of the subcontractors of J. W. Wright, Jr., who performed work and labor on said railroad and the correctness of whose claims said Wright has admitted, the following have been purchased by and assigned to the defendant, R. M. Hall, to wit: J. F. Cooley, $225.24; Burke, Pardue & Burke, $1543.83; and that the amount

158 claimed by the said R. T. Sorrell is $1063.88, which claim has also been admitted by said Wright to be just and correct, and as heretofore averred said R. T. Sorrell now has a suit pending against this defendant to recover said amount and to enforce the statutory lien and unless said claim is paid by said Wright, this defendant will probably have the same to pay, together with interest and costs, in which event it should be subrogated to the rights of said R. T. Sorrell against the complainant.

This defendant therefore answers and says that the complainant is not entitled to recover anything either from the Jackson Construction Company or this defendant; that he had already been overpaid for his alleged work and services; that his said work and services were not worth the amount which has been advanced thereon; and that the complainant is not entitled to any lien on this defendant's property for any purpose; and this defendant denies that it is enjoying the fruits of any of the said Wright's labor for which he has not already been paid.

XIII.

As to the allegations of the XIII paragraph of complainant's original bill, and the various paragraph- and allegations of the amended

and supplemental bills filed March 22nd, 1912, and March 26th, 1912, respectively, this defendant is advised that it is not required to answer same, but should any of the allegations therein contained become material to this defendant's rights, the same are denied. This defendant here and now points to the various and sundery reckless allegations contained in said amended and supplemental bills as further evidence of the scheme of the said J. W. Wright, Jr., to extort money from the defendants, as the purpose and motive of filing said amended and supplemental bills with their
159 wild and infalted allegations, are perfectly apparent.

XIV.

For further answer this defendant says that the said J. W. Wright, Jr., divided and apportioned the work on said railroad to various sub-contractors, as hereinabove shown; that the work allotted and contracted to said independent contractors was such as grubbing, excavating, ditching, building embankments and making cuts, hauling, etc.; that all the work performed by said independent contracts was prior to November 15th, 1911, and that the said Jackson Construction Company made advance payments to said Wright based upon estimates of the work performed by said independent contractors, and largely more than sufficient to fully cover the amount contracted to be paid for such work; that the said Wright settled with some of said sub-contractors and with others he refused to settle, so that a number of said subcontractors now hold claims for alleged balances due them for work, and one of them namely, R. T. Sorrell, has undertaken to assert a lien on this defendant's railroad property to collect the amount alleged to be due him by complainant and now has a suit pending in the Chancery Court of Dyer County for that purpose; that the said J. W. Wright, Jr., did not serve or cause to be served upon this defendant any notice of lien for the alleged work and services performed by said independent contractors within ninety days after the performance of such work and services, and has never given this defendant any legal or proper notice of any
160 such lien or claim; that more than ninety days expired after the performance of such services before the giving of any notice or claim of lien by complainant and before the filing of the bill in this cause; hence defendant shows that the complainant is not entitled in any event, to recover of it or to have any lien on its property for any work and services performed by said independent contractors.

XV.

And further answering this defendant says that the complainant is not entitled to maintain this suit nor to any standing in Court by reason of the following facts, to wit: The laws of this State in force during the year 1911 when the said contracts were attempted to be made and entered into by the Jackson construction Company and J. W. Wright, Jr., and during all the time that said construction

work was being performed by said Wright, provided that all construction companies and persons engaged in the business of building and constructing railroads should procure a license and pay a privilege tax. Section 4 of Chapter 479 of the Acts of 1909 of the General Assembly of Tennessee providing: "That each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the County Court Clerk as provided by law for the collection of revenue."

* * * * * * *

"Each foreign construction company, with its chief office outside of the State, ope-ating or doing business in this state, directly or by agent, or by sub-letting contract, each per annum, in each County..... $100.00

161 "Each domestic construction company and each foreign construction company, having its chief office in this State, doing business in this State, each per annum in each county..... $25.00

"The above tax shall be paid by persons, firms or corporations engaged in the business of constructing bridges, waterworks, railroads, street-paving construction work, or the other structures of a public nature."

And by Section 14 of said Act it is provided that all parties, firms and corporations exercising any of the foregoing privileges must pay the tax as set forth in said Act for exercising of said privilege, whether they make a business of it or not; and by Section 16 of said Act it is declared to be a misdemeanor to exercise any of the foregoing privileges without first paying the taxes prescribed for the same and that all parties so offending shall be liable to a fine of not less than $10.00 nor more than $50.00 for each day such privilege is exercised without a license; and said act provides further penalties and confers upon grand juries inquisitorial powers relative to said offenses.

That the said J. W. Wright Jr., was a person engaged in the business of constructing bridges, railroads and other structures of a public nature, and was liable for the payment of said privilege tax in each of the counties of Madison, Crockett and Dyer, Tennessee, and was required by law to obtain a license in each of these counties before undertaking to exercise said privilege or to carry on said business; that, he never, at the time said Wright attempted to enter into said contract with the Jackson Construction Company on April

162 13th, 1911, and during the time he was making his said contracts with the sub-contractors, and during the time he was exercising said privilege and carrying on the business aforesaid and constructing said railroad, the said J. W. Wright Jr., had not and did not take out a license nor pay the privilege tax as required by law in either of the counties aforesaid, that said Wright did not apply for a

license or offer to pay the said tax until about the time he instituted this suit, to wit: March 17, 1912, when he applied to the County Court of each of said counties for a license to cover the period of one year from May 1st, 1911, to May 1st, 1912, and offered to pay the tax for said period, and accordingly privilege licenses were issued to him for said period. That in making all of said contracts and engaging in said construction work and in exercising said privilege without a license or having paid the required tax, the said Wright was guilty of violating the laws of this State, and hence, he is not entitled to assert in the courts of this State any claim based upon contract or otherwise growing out of a business carried on in violation of law.

XIV.

All other allegations of the complainant's original, supplemental and amended bills, which this defendant is required to answer, and which have not already been admitted are denied herein, and are now denied generally. And having fully answered this defendant prays to be hence dismissed with its reasonable costs.

BIGGS & SPRAGINS,
Solicitors for Defendant B. & N. W. Ry. Co.
BIRMINGHAM & NORTHWESTERN
163 RAILWAY COMPANY,
[SEAL.] By R. F. SPRAGINS, *Secretary.*

164 *Answer of Defendant Union Bank & Trust Company.*

Filed July 14, 1913.

J. W. WRIGHT, JR.,

VS.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY et al.

Answer of Defendant Union Bank and Trust Co.

The Union Bank & Trust Co., for answer to so much and such parts of the complainant's original, amended and supplemental bills as it is required to answer, or as it is deemed material for it to answer, says:

It is admitted that this defendant is the Trustee in *in* a trust deed executed by the Birmingham & Northwestern Railway Company to secure an issue of five per cent twenty year first mortgage bonds on said Railway Company, the terms and conditions of which trust will appear by reference to the original copy of said trust deed; that the bonds issued under and in accordance with said deed of trust have passed into the hands of innocent holders for value, in due course, and the same constitute and are a prior lien on the properties of said Railway Company, paramount and superior to any lien claimed by the complainant.

It is denied that the complainant is entitled to any lien on the railroad and property of the defendant Railway Company for work and labor or otherwise, prior or superior to the lien of said first mortgage bonds.

165 All other allegations of the complainant's said bills which may become material to the rights of this defendant as Trustee aforesaid, not already admitted or denied herein, are now denied generally, and this defendant prays that no decree be entered herein prejudicial to its rights as trustee aforesaid or to the rights and liens of the holders of said first mortgage bonds.

BIGGS & SPRAGINS,
Solicitors for Union Bank & Trust Company.

166 *Answer of R. M. Hall.*

Filed July 15, 1913.

J. W. WRIGHT, JR.,

vs.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY et al.

The Separate Answer of R. M. Hall to the Original bill, to the Same Amended, and to the Amended and Supplemental Bills Filed Against Him and Others in the Above-entitled Cause.

The said R. M. Hall for answer to so much and such parts of said bills as have not been heretofore dismissed as to him on demurrer and as he is advised it is material for him to answer, answering says:

A.

The defendant, R. M. Hall for answer to each and every allegation of the original, amended and supplemental bills wherever the same may be made, or in whatsoever connections made says that he is not liable unto the said J. W. Wright Jr. or his administratrix as surety in any sum or to any extent whatsoever; and now shows unto the Court the following facts, to wit:

The original contract was made and entered into on the 13th day of April, 1911, by and between J. W. Wright Jr., and the Jackson Construction Company and was signed by J. W. Wright Jr., for himself and by the Jackson Construction Company by R. M. Hall, President.

167 Article XII of said contract provided that J. W. Wright Jr., "shall supply the *somply* with a good and sufficient bond, acceptable to the Company, to the amount of Fifty Thousand Dollars for the faithful carrying out and completion of this contract, etc."

When said contract was made and entered into there was no condition of said contract that the said Jackson Construction Company

should give bond for the faithful performance of said contract and nothing said about the Jackson Construction Company giving a surety bond, but as before stated, J. W. Wright Jr., was to give a bond in the sum of $50,000.00 for the faithful perfor-ance of his contract.

Several days thereafter, J. W. Wright Jr., communicated with defendant Hall and said that the surety company in which he intended to make said bond would not make said bond, unless R. M. Hall would guarantee the performance of the contract on the part of the Jackson Construction Company and that in order for him to make the bond which he intended to make in some surety company, he requested R. M. Hall to execute the paper writing referred to in the fourth section of complainant's bill. For that reason, and that reason alone, and as a favor to said Wright to assist him in making his said bond, he, R. M. Hall, on April 17th, 1911, executed the guaranty set out on page 12 of complainant's bill.

Defendant would further state and show that after he executed said guaranty the said J. W. Wright Jr., wholly failed to make said bond as provided by said original contract.

Wherefore this defendant says that said guaranty was and is not binding on him in any way for the following reasons:

168 1st. The guaranty was made after the contract between the Jackson Construction Company and J. W. Wright Jr., had been executed and had become a binding obligation, and that said guaranty was without consideration.

2nd. It was made for the purpose and upon condition that J. W. Wright Jr., executed a bond to the Jackson Construction Company to guaranty the performance of his part of said contract and said condition was not complied with, the said Wright never having executed the bond, and said guaranty was therefore without consideration.

3rd. Because it was never contemplated by either defendant, Hall or Wright, that said guaranty should be executed for any other purpose than to assist and make it possible for Wright to execute bond.

B.

This defendant further answering says that after, he executed said guaranty aforesaid, the said J. W. Wright Jr. about the — day of November, 1911, and various other times prior thereto, breached his said contract with the Jackson Construction Company by then and there refusing to further carry out and perform his contract with said Jackson Construction Company, as in said contract provided, and refused to proceed further with said contract unless the said contract was changed and modified.

169 Defendant further states that thereafter on the 14th day of November 1911, the original contract between Wright and the Construction Company was materially altered and changed by the said Wright and said Construction Company without his consent and over his protest, and that by no act of his personally, did he bind himself thereon, nor was such a thing ever contemplated by the parties thereto.

Defendant admits that for and on behalf of the Jackson Construction Company, by direction of the Board of Directors of said Company, and over his personal protest, he as President of said Company, signed said amended contract, but he did not sign the same personally nor did he intend to bind himself thereon.

Wherefore this defendant says that he is not liable to the said J. W. Wright Jr., as surety, for the following reasons viz:

1st. That the said J. W. Wright Jr. breached his said contract with the Jackson Construction Company, upon which it is alleged he is surety and without cause refused to carry out and perform the same and that the said J. W. Wright Jr., having first breached said contract, this defendant is released from any liability thereon or thereunder.

2nd. That he, the said Wright, demanded and had said original contract materially altered and changed without the consent of this defendant, and therefore this defendant is not liable as surety on said contract.

C.

This defendant further answering says that the said J. W. Wright Jr. in December 1911, for the consideration of $15,000.00, executed a certain paper writing in the following words and figures, to wit:

170 "In consideration of the payment of Fifteen Thousand ($15,000.00) Dollars, account of building railroad from Jackson to Dyersburg, I, J. W. Wright Jr., agree that I will hold the Jackson Construction Company, the Birmingham & Northwestern Railway Company and R. M. Hall harmless and free from liability from any claims, contracted by me with subcontractors, and second,

I further agree that I will ask no additional payment on account of building said railroad until the completion of my contract.

Witness my hand and seal the — day of December 1911."

This defendant further states that the said J. W. Wright Jr., never did complete and never has completed, his contract with the Jackson Construction Company, in that he wholly failed without lawful excuse to build and construct said railway according to the terms and provisions of said original contract as changed and amended.

The defendant states that the work on the roadbed performed by Wright was not done in a workmanlike manner, wholly failed to conform to the contract and specifications and was so defectively and negligently done as to be wholly insufficient and unsuited for railroad purposes; the roadbed as not graded and embankments thrown up as required by the contract and specifications; the depot grounds and sites for water stations were not prepared; highways and private ways were not cut down or raised as required; embankments were not constructed properly with material taken from the excavations, but stumps or trees were left in the right of way, and brush, trash, logs and other unsuitable materials were used

in making embankments, culverts and masonry work was
171 not done in accordance with the specifications in that defective material was used and the work was not done in a workmanlike manner; and in filling over culverts the embankments were not carried up in layers of uniform depth, so as to give a uniform pressure on the culverts; excavations were not taken out with a 14 foot base and slopes of one to one; the embankments were not constructed with a twelve foot crown nor with one and one-half to one slopes; no ditches were made as required by the specifications; embankments were not started at the base of the full width indicated by the slopestakes and built to the true slope without widening with loose material from the top; the right of way was not cleared at least fifty feet on each side of the center line where the right of way is one hundred feet wide nor at least twenty-five feet on each side of the center line where the right of way is fifty feet wide, and trees, stumps, undergrowth and brush in the right of way were not cut and removed as required by the specifications; grubbing was not done in excavations under embankments in the manner as required; the track was not laid properly; was not full tied, bolted and spiked, with 2640 ties per mile; switches and sidings were not constructed as provided in the specifications; the track was not lined in accordance with centers; ties were not brought to a line on the line side nor as required by the specifications and contract; ties were not uniformly and properly spaced nor at right angles to rails, nor was there proper elevation of the outer rail on curves; none of the tracks were properly surfaced or ballasted; and in attempting to surface the track the said Wright and his employees robbed the crown of *of* the embankment and the berm; steel shims were not furnished by the contract- as he was
required; the track was not dressed in accordance with the
172 diagrams furnished, ditches were not left in uniform condition so that drainage would be unimpaired nor ditches at all being cut as required by the specifications, nor was any part of said track laid upon a hard smooth surface in accordance with grade lines established by the engineer, nor in such manner as to safely permit the operation of trains over and along said track from Bells to Dyersburg at a maximum speed of twenty miles per hour without injury to the rails and equipment, nor was said track first class in any particular; but practically all of the work performed or attempted to be performed by the said J. W. Wright, Jr., was improperly, recklessly and negligently performed, defective and insufficient and failed utterly to comply with said contracts and specifications. Said railroad was left by the said contract in such an incomplete, dangerous and unsafe condition that the Jackson Construction Company and Birmingham & Northwestern Railway Company were compelled to employ labor and spend large sums of money in order to put the road in condition so that same could be used for the purposes for which it was intended. As this defendant is advised and believes and so avers, the said Wright has already been paid largely more than the value of any services performed by him, his employees and subcontractors.

This defendant further states that the said Wright never did complete said contract in that he left a large part of said railway incompleted as will be fully shown in the proof.

Whereby by reason of said payment of $15,000.00 and the agreements of the said Wright, to complete his contract, and by reason of his failure to complete same, this defendant says he is not liable as surety aforesaid.

173 D.

This defendant further states that the compiainant has no just or valid claim against him as surety for the reasons heretofore *said* forth, and that the complainant should be given no relief as against this defendant by reason of the following facts which this defendant now sets up by way of further answer.

Under and by virtue of the statute law of Tennessee which was in full force and effect at the time the contract between this respondent and the said J. W. Wright Jr., was made and entered into, and which statute law ever since then has continued to exist and be in full force and effect, and is still existent and in full force and effect as the law of this State; it was and is provided in substance and effect as follows, to wit: That each person, firm or corporation engaged in the business of constructing bridges, waterworks, railroad, street paving construction work, or other structures of a public nature shall pay a privilege tax as fixed and authorized by said statute law of Tennessee, before such person, firm or corporation engaging in such business or avocation, shall be authorized to lawfully pursue such business or avocation and to do and perform any act in the pursuit thereof within the State of Tennessee; and any act done within the State of Tennessee, by any person, firm or corporation in the pursuit of such business or avocation without first having paid the privilege tax so made a prerequisite of the engaging in such business or avocation within the State of Tennessee was and is declared to be unlawful and to be a misdemeanor; and no person, firm or corporation could or can lawfully commence or continue to engage in the business of constructing bridges, waterworks, railroads, street paving construction work, or other structures of a public nature, without having first paid the privilege taxes so fixed and authorized by said statute law of
174 Tennessee and having obtained from the County court clerk authorized to collect the said privilege tax, a license showing the payment of such privilege tax, and the authority to engage in such business or avocation, as is by said statute law expressly declared a necessary prerequisite to the lawful commencement of or continuance in, the engaging in such business, by any person, firm, or corporation within the State of Tennessee.

Respondent further answering defends and says that the complainant, J. W. Wright Jr., and defendant Jackson Construction Company at the time they entered into and made the contract relative to the construction of the said line of railway from Jackson, Tennessee, to Dyersburg, Tennessee, had not paid the privilege tax

that was then and there required to be paid by them under the statute law of Tennessee nor had they secured any license authorizing them to engage in the business, of constructing said line of railway which was to be built entirely within the State of Tennessee in the Counties of Madison, Crockett and Dyer of said State; and because of such failure upon the part of the said J. W. Wright Jr., and the Jackson Construction Company to pay said privilege tax and obtain such license in manner and form as then required by the statute law of the State of Tennessee, they were then and there without lawful authority to make said contract or to do and perform any act in furtherance thereof.

Respondent further answering defends and says that at no time while the said J. W. Wright Jr., was engaged in the business of the construction of said line of railway from Jackson to Dyersburg, Tennessee, had he or the Jackson Construction Company paid the privilege tax then or there justly due and owing by them under the statute law of Tennessee aforesaid nor had they obtained any license as required by said statute law authorizing them to engage in the business of constructing said line of railway, and
175 every act done and performed by them and those in their employ and working for and under them either as employee, subcontractor or otherwise, in the matter of the construction of said line of railway was unlawful and in violation of the express provisions of said statute law of Tennessee, and that complainant and all persons setting up in this proceeding any rights as arising to them by virtue of any alleged claim the said J. W. Wright Jr., is now making against this respondent, should be repelled from this Honorable Court, and denied any and all relief in this cause.

Respondent further answering defends and says that it is advised that after the said J. W. Wright, Jr., had ceased to do any further work upon said line of railway and after he had abandoned any and all efforts to perform and carry out his contract with this respondent relative to the construction of said line of railway, and just a short while before his original bill was filed in this cause, that the said J. W. Wright, Jr., acting upon advice of his attorneys undertook to make some sort of payment to the county court clerks of Madison, Crockett and Dyer Counties, in the State of Tennessee, for the purpose of satisfying the privilete tax which was and has been lawfully due and owing by him under the statute law of Tennessee because of his having engaged in the business of construction of said line of railway, and did receive some sort of paper writing from said County Court Clerks evidencing such payment as was then made by him. Respondent has not seen the said papers so obtained by the said J. W. Wright, Jr., from said County Court Clerks, but upon information and belief he shows to the Court that said paper writings do not show the true facts attempted to be evidenced thereby; and respond-
176 ent states and shows to the Court that the real facts are and were that neither J. W. Wright, Jr., nor the Jackson Construction Company had at any time prior to the making of the said contract of April 13, 1911, relative to the construction of said line of railway from Jackson to Dyersburg, Tennessee, paid the privilege

tax required by the statute law of Tennessee then and there in full force and effect, and that at no time during which the said J. W. Wright, Jr., was actually engaged in the business of constructing said line of railway and in attempting to perform his said contract as originally made and as subsequently modified by the supplemental and amended agreement of November 14, 1911, and that neither the said J. W. Wright, Jr., nor Jackson Construction Company paid or attempted to pay the privilege tax which they were then and there legally obligated to pay under the statute law of Tennessee as aforesaid; and that it was not until the day the original bill in this cause was filed by complainant or a short while previous to filing of his said original bill, and at a time subsequent to the making of his said contracts and the actual performance of services in an attempt to construct said line of railway, that the said J. W. Wright, Jr., or Jackson Construction Company made any payment of any privilege tax required of them by said statute law of Tennessee, or any attempt to comply with the requirements of said statute law of Tennessee; and that neither the said J. W. Wright, Jr., nor Jackson Construction Company, at the time of the making of said contracts and all along during the time they were engaged in the business of constructing said line of railway from Jackson to Dyersburg, Tennessee, had any license authorizing them to engage in such business within the State of Tennessee and had not paid any privilege tax required of them as a prerequisite condition to engaging in such business in the State of Tennessee; and that every act of the said J. W. Wright, Jr., and Jackson Construction Company and of the
177 employees and subcontractors of them or either of them, had and done in pursuit of the business of constructing said line of railway from Jackson, Tennessee, to Dyersburg, Tennessee, was unlawful and violative of the provisions of said statute law of Tennessee, and wholly without warrant or authority of law. Respondent therefore further answering defends and says that because of the said provisions of the statute law of this State and of the failure of the said J. W. Wright, Jr., and Jackson Construction Company, to comply with the same as above set forth, that complainant has no standing in Court and no right to invoke the aid of the Honorable Court in this cause, that neither J. W. Wright, Jr., nor the Jackson Construction Company has any lawful authority to make the contract sued on in this cause, and that complainant should be repelled and the suit dismissed at complainant's cost.

E.

The defendant Hall most emphatically denies the allegations in complainant's amendment to Original Bill filed August 30th, 1912, that he consented to said amended contract and in fact actually participated in making the same and that said contract was made at his instance and request.

The facts in regard to this matter have been heretofore in this answer fully set out.

F.

All other matters in said Bills, original, amended, and supplemental not hereinbefore expressly admitted or denied, are here
178 and now generally denied in as full and ample a manner — if set out and denier in detail.

McCORRY & SNEED,
Sols. for Deft. Hall.

179 *Answer of Mrs. Susie E. Wright to Cross Bill of Jackson Construction Company.*

Filed December 14, 1914.

J. W. WRIGHT, JR.,

vs.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY et al.

Answer of Mrs. Susie E. Wright, Administratrix of J. W. Wright, Jr., to the Cross Bill Filed Against Her Herein by Jackson Construction Company.

I.

Respondent admits that she is the Administratrix duly appointed, qualified and acting of the Estate of J. W. Wright, Jr., but she denies all other statements and allegations in said cross bill which controvert or seek to avoid the charges and allegations contained in the original, amended and supplemental bills filed *hereby* by her intestate.

II.

Respondent says that her intestate fully complied with all his agreements and contracts with cross-complainant, except as he was prevented by the acts of cross-complainant or its agents and representatives; that her intestate did not complete said road for the reasons fully set out in his pleadings heretofore filed in this cause, and not now necessary to repeat.

Respondent further denies that Cross-complainant was injured or damages in any sum by any act of omission or commission or her intestate.

180 III.

Likewise does Respondent deny that cross-complainant overpaid her intestate but on the contrary asserts that after allowing credit for all items paid him, cross-complaina-t still owes him more than $100,000.00 for and on account of the matters fully set out and claimed in the original, amended and supplemental bills herein.

Especially does respondent indignantly deny the aspersions cast on the honor and integrity of her deceased husband in said cross-bill. He neither corrupted or attempted to corrupt Mike Harvey, John Todd, or any other employee of cross-complainant. Neither did he seek to defraud or deceive cross-complainant. All such charges are known to cross-complainant to be unfounded.

IV.

Respondent denies that her intestate or his agents or employees damaged or destroyed any engines or cars furnished him by cross-complainant, or that her intestate agreed to pay for said alleged damages, or that cross-complainant paid same.

V.

Respondent denies all other statements in said cross-bill contained not heretofore admitted or denied and calls for strict proof of same.

And now having fully answered respondent asks to be dismissed.

C. E. PIGFORD,
Solicitor for Respondent.

181 *Entry of Findings of Jury on Issues.*

Entered August 3rd, 1915. M. B. 26, P. 12.

J. W. WRIGHT, JR.,

vs.

B. & N. W. RY. Co. et al.

Be it remembered that on this the 3rd day of August, 1915, came the parties and their solicitors and the jury on yesterday respited, whereupon the further hearing of the cause was resumed.

The hearing of all the evidence having been completed and the cause having been argued to the jury by the respective counsel for the respective parties, the Court delivered the charge to the jury, and the jury retired to consider the issues submitted to them.

After due consideration by the jury, they returned into open Court and reported their findings upon the various matters submitted to them.

The issues submitted to the jury, and their respective findings thereon are in the words and figures following, to wit:

1. Is Exhibit "A" to complainant's original bill the original contract entered into between J. W. Wright Jr. and Jackson Construction Company for the building and construction of the line of railroad of the Birmingham & Northwestern Railway Company.

Yes.

2. What amount, if any, is due Mrs. Susie E. Wright as ad-

ministratrix of the estate of the said J. W. Wright, Jr., deceased, for work and labor done and performed and services rendered and
182 materials furnished and used by her intestate upon the line of railroad of said Birmingham & Northwestern Railway Company under the contract of the said J. W. Wright Jr., with the Jackson Construction Company of April 13, 1911, and the supplemental contract of November 14th, 1911, in building and constructing said line of railroad?

None.

3. Did the Jackson Construction Company breach its contracts with the said J. W. Wright Jr., if so state the amount of damages, if any, sustained by the said J. W. Wright Jr., by reason of such breach?

Yes.

None.

4. What, if anything, is the reasonable value of the benefits had and received by the Jackson Construction Company or the Birmingham & Northwestern Railway Company by reason of the work and labor done or material furnished by said J. W. Wright Jr. or by his agents, employees or the subcontractors under him in building and constructing said railroad, over and above the amounts paid said Wright therefor or paid to other persons on his account or at his instance or request and over and above all damages, if any, sustained by said Jackson Construction Company or by said Birmingham & Northwestern Railway Company by reason of the failure of said Wright or his agents, employees or sub-contractors to complete said road according to the terms and specifications of said contract.

$7,836.50
1,567.30 Interest.

$9,403.80.

183 5. Did J. W. Wright Jr., within ninety days after the work and labor were done and performed and material furnished notify in writing the Birmingham & Northwestern Railway Company that he claimed a lien upon its line of railway, and if so, is Exhibit No. 4 to complainant's bill in this cause the notice so given to said Birmingham & Northwestern Railway Company.

Yes.

6. Had the said J. W. Wright Jr. at the time he contracted with the Jackson Construction Company, relative to the construction of the line of railway of the Birmingham & Northwestern Railway Company from Jackson Tennessee, to Dyersburg, Tennessee, then paid the privilege tax required by the laws of Tennessee, and procured a license either in Madison, Crockett or Dyer Counties, Tennessee, authorizing him to engage in the business of constructing railroads in said counties?

No.

7. Did the said J. W. Wright, Jr., at any time pay the privilege tax required by the laws of Tennessee and procure a license in either

Madison, Crockett or Dyer Counties, Tennessee, authorizing him to engage in the business of constructing, in said counties or either of them, the line of railway involved in this suit, or railroads in general, if so, state the date or dates when such licenses were procured and issued, where procured and when payment therefor was made?

Yes.

Paid in Crockett County, March 18th, 1912.

Paid in Madison County, March 14th, 1912.

Paid in Dyer County, March 15th, 1912.

184 8. Had the Jackson Construction Company, at the time it entered into the contract with the said J. W. Wright Jr., and the Birmingham & Northwestern Railway Company, relative to the construction of the line of railroad of said company, or at the time of making the contracts of April 11, 1911, and November 14, 1911, with J. W. Wright Jr., relative to the construction of said line of railway, then paid the privilege tax required by the laws of Tennessee, and procured a license in either Madison, Crockett or Dyer Counties, Tennessee, authorizing it to engage in the business of constructing railroads in said counties or either of them.

No.

9. Did the said Jackson Construction Company at any time pay the privilege tax required by the laws of Tennessee, and procure a license in either Madison, Crockett or Dyer Counties, Tennessee, authorizing it to engage in the business of constructing in said counties or either of them said line of railroad, or railroads in general, and if so, state the date or dates, such license or licenses were procured and issued, where procured and when payment was made?

No. In Dyer and Crockett Counties.

Yes. In Madison County—Paid March 26, 1912.

10. Was there any fraud or collusion between the said J. W. Wright Jr., and Mike Harvey, Chief Engineer of the Jackson Construction Company, relative to or in connection with the construction by said Wright of said line of railway?

No.

11. Did the said J. W. Wright Jr., breach his contracts with the Jackson Construction Company and if so, then state the amount of damages, if any, sustained by said Jackson Construction Company by reason of such breach?

Yes.

None.

185 12. What amounts, if any, have said Jackson Construction Company, the Birmingham & Northwestern Railway Company, and R. M. Hall paid to J. W. Wright, Jr., and to other parties at his direction on his account, stating the amount paid by each?

Jackson Construction Company		$117,756.83
" " "	2 cars	736.75
" " "	4 flat cars	661.60
" " "	Coal	713.32
" " "	Demurrage	941.00
		120,809.50
B. & N. W. R. R., Damage to engine		1,000.00
" " " " " "	J. W. Pearson, judgment	149.20
" " " " " "	R. T. Sorrell "	1,238.38
" " " " " "	Burke, Pardue & Burke, judgment.	1,286.39
		124,483.47

13. Was there any fraude in any of the monthly estimates prepared by Mike Harvey, Chief Engineer of the Jackson Construction Company or in the approval of any of the work performed on said railroad by said J. W. Wright, Jr.?

No.

14. If said J. W. Wright Jr. did not complete said railroad according to his contract and the Jackson Construction Company, the Birmingham & Northwestern Railway Company, or R. M. Hall, or either of them, paid out any amount in order to complete the same according to said contracts, then state the amounts so paid by them or either of them, stating by whom payments was made, with which the said Wright should be charged.

None chargeable to J. W. Wright Jr.

Thereupon the jury was discharged.

All other matters are reserved by the Court for future hearing and determination.

186 *Order Allowing Amendment as to Exhibit.*

Entered July 20, 1915, M. B. 26, P. 2.

J. W. WRIGHT, JR.,

vs.

B. & N. W. RY. CO. et al.

Comes the complainant after the jury had been empaneled and sworn and pleadings were read to the jury, and asks leave of the Court to amend paragraph Three on page 5 of the original bill filed on the 19th day of March, 1912, by adding the following at the ending of said paragraph of same and after the word "for" the following:

Complainant would state that said copy, Exhibit I, is a substantial copy of said contract of April 13th, 1911, but he here and now files said original contract being one of the duplicate contracts of date about April 13th, 1911, the said Construction Company retaining the original duplicate of said contract. Said original contract with the

original specifications as part of same are filed as Exhibit 'A' to this bill and asked to be taken as part of same but not to be copied.

Which motion is by the Court this 20th day of July 1915, allowed and it is accordingly done. To which ruling and action of the Court the defendants, Birmingham & Northwestern Railway Company and Jackson Construction Company, and R. M. Hall severally then and now except.

187 *Exhibit "A" to Original Bill.*

Filed July 25, 1915.

This agreement made this 13th day of April, in the year one thousand nine hundred and eleven by and between J. W. Wright, Jr., party of the first part (hereinafter designated the Contractor,) and Jackson Construction Company, a corporation under the laws of the State of Tennessee, with its situs in Madison County, Tennessee, party of the second part (hereinafter referred to as The Company; Witnesseth:

That the Contractor in consideration of the payment and covenants hereinafter mentioned to be made and performed by the Company, agrees with said Company as follows:

Article I. The Contractor shall and will provide all equipment and perform all work for the completion of the constructing and building of the railroad from Jackson, Tennessee, to Dyersburg, Tennessee, in accordance with specifications herewith which become hereby a part of this contract.

Article II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the Chief Engineer of said Company, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said Engineer, and the Contractor agrees to conform to and abide by the same so far as they may be consistent with the purpose referred to in Article I.

188 It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purpose of this contract by said Engineer are and remain the property of the Company.

Article III. No alterations shall be made in the work as designated except upon the written order of the Engineer, the amount to be paid by the Company or allowed by the Contractor by virtue of such alterations will be stated in said order. Should the Company and Contractor not agree as to the amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be settled by arbitration by three persons: The Company to select one, the Contractor one, and these two the third.

Article IV. The Contractor shall provide sufficient, safe, and

proper facilities at all times for the inspection of the work by the Engineer or his authorized representatives. The Contractor shall, within twenty-four hours after receiving written notice from the Engineer to that effect, proceed to remove from the grounds or structures all materials condemned by the Engineer or his authorized agent, whether worked or unworked, and to take down all portions of the work which the Engineer shall by written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby, at his own expense.

The Contractor agrees to keep a competent man on the work at all times during working hours, authorized to receive and carry out the instructions of the Engineer.

189 The different branches of the work under this contract are intended to be, and are, included in one contract, with the Contractor solely responsible for all work and men employed. The Contractor shall not assign this contract, nor sublet or transfer the whole or any part or parts of the work under it, to any person or corporations (except for delivery of materials) without the consent of the Engineer, in writing, but will give personal attention and superintendence to the work, and the Contractor will not be released or discharged from any responsibility or liabilities under this contract owing to such assignees, sub-contractors, or their agents, employees, or servants being allowed to engage in the work now under this contract.

Article V. The Company reserves the right to suspend operations on the work under the contract, or on any particular part or parts, giving the Contractor twenty (20) days' notice, and in the event of such right being exercised, the Engineer shall grant to the Contractor an extension of time equal to the time of the suspension of the work, It is further understood and agreed that, on such suspension, the Contractor may have the option to close and settle up for the work done, according to the estimate of the said Engineer; such suspension or settlement of the work, however, shall not entitle the Contractor to any claim for damages; or, if the Company shall postpone or suspend the work under this contract indefinitely or altogether, which it reserves the right to do, then in that case, the Engineer shall prepare a final estimate of the value of the part of the work done, such estimate to include all materials purchased or delivered to the Contractor, or specially designated and ordered for the work

190 under this contract, the same as if the work had been completed, and this contract shall thereupon be terminated. All materials paid for and included in such final estimate that are not on the property of the Company, shall be delivered to the Company before such estimate is made. The cancelling of this contract shall not entitle the Contractor to any claim for damages for anticipated profits on it.

In case the Contractor shall become financially embarrassed, or refuse, or be unable to prosecute the work diligently, or fail to pay promptly bills or wages incurred for the work, or any one or more of joint Contractors shall become a bankrupt, or make a general

assignment for the benefit of creditors, or if the property of any such Contractor or Contractors shall be levied upon or taken in execution or under attachment, or by any judicial process whatsoever, or if, by reason of insolvency or bankruptcy, he or they shall be unable to fulfill the covenants herein contained, fully and effectively, according to the true intent and spirit thereof, the Engineer, at his discretion, acting for the Company, may at any time declare this contract or any portion or section in it terminated.

Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of material of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect, or failure being certified by the Engineer, the Company shall be at liberty, after twenty (20) days' written notice to the Contractor to provide such labor or materials and deduct the cost thereof from any money then due, or thereafter to become due to the Contractor under this contract.

191 In case the work under this contract shall be assumed by the Company, as provided above, the Engineer shall have the authority and right, as his discretion, to take possession for the Company, and make use of the plant, and of any or all construction materials, both such as enter into the completed work, and such as are required during construction, delivered by the Contractor at the site or in the vicinity of the work.

The fair value of all such materials as enter in the work so taken to be established by the Engineer, and such value, less any previous payments made for such materials, shall be allowed and paid to the Contractor in the final estimate or settlement of his account as for so much work done under his contract.

Article VI. The contractor agrees to begin and to prosecute the work covered by this agreement in the manner stipulated in the specifications and with the forces therein set forth, and to complete the work in six (6) months from this date; but the Company is to furnish all material on the ground when called for by the contractor after twenty (20) days' notice, and delays caused by the Company to be deducted from the said period of six months in which the work is to be completed; that is, the time for the completion of said work is to be extended to the extent of any delays caused wholly by the fault of the Company.

Article VII. It is further agreed that with reference to rails and all such material as may be delivered on the cars at Dyersburg or Jackson, upon notice to the Contractor of the delivery of such material at either of said places, the Contractor shall thereafter be liable for all charges and expense of unloading, hauling, storage, and demurrage incurred or accruing relative thereto.

192 Any person in the employ of the Contractor, or of any sub-contractor, who shall, in the opinion of the Chief Engineer, execute his work in an unfaithful or unskillful manner, or prove disrespectful or riotous in his conduct, shall, forthwith, at the direction of the Chief Engineer, be discharged.

Article VIII. It is expressly understood and agreed that the Con-

tractor shall provide outfits, forces, and equipment for the prosecution of the work covered by this contract in accordance with the requirements specified in the specifications, and that he shall maintain the said forces, outfits, and equipments continuously on the work until it- final completion. If the said outfits, or any of them, should be delayed in starting to work after having reached the site of the work, by a failure of the Company to provide right of way, it is understood and agreed that the said Company shall pay to the said Contractor the expenses of maintaining the said outfits until such time as said right of way shall have been provided.

Should the Contractor be delayed in the prosecution of the work by acts of his employees, or by strikes caused by his employees, or by any damage caused by fire, lightning, earthquake, cyclone, or any other casualty, for which the Company is not responsible, then and in that case, the Contractor shall have no right or claim against the Company, but the expense of the said delay shall be at the sole risk of the said Contractor.

Article IX. It is definitely understood and agreed that the Chief Engineer of the Company shall have the right to instruct the order in which the work shall be done and to direct which portions of the work must be covered first.

193 Article X. It is hereby mutually agreed between the parties hereto that the amounts to be paid by the Company to the Contractor for the work covered by this contract shall be at the following rates:

For clearing, $35.00 per acre.

For grubbing, $3.00 per acre.

Grading for earth work and all other material without classification, including 500 feet free haul, 19½ cents per cubic yard.

For overhaul, 1¾ cents for each cubic yard and each 100 feet hauled beyond 500 feet.

For bridging for driving and cut off piles in pile and trussel bridges under cap, 27½ cents per lineal foot;

For laying 24″ drain pipe, 45 cents per lineal foot;

For hauling 24″ drain pipe, 65 cents per ton per mile.

For timber in place $11.00 per B. M.;

For track laying $625.00 per mile;

For laying crossings, $35.00 per crossing;

For laying frogs, including scitch connections, $50.00 per frog.

For building wings and laying cattle guards, $10.00 per guard.

For excavation in water for foundation — per cubic yard; subject to addition and deductions as hereinbefore provided, and that such amounts shall be paid by the Company to the Contractor.

On or about the first day of each month, during the progress of this work, an estimate shall be made by the Engineer of the work done up to such time, and upon his certificate of the amount

194 being presented to the proper officials of the Company, or such disbursing agent as the Company may appoint, the amount *said* -aid estimate, less a retained ten per cent, and less previous payments, shall be paid to the Contractor, on or before the 20th day of

each month for the work done in the previous month, at the nearest disbursing point of the Company to the Contractor's office.

If demanded by the Engineer, said Contractor shall furnish to the said Company or Engineer receipts vouchers, affidavits, schedules, all permits, etc., required by the State and Municipal Laws and Ordinances; or if at any time there shall be evidence of any liens or claims for which, if established, the Company might become liable, and which is chargeable to the Contractor, the Company shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to completely indemnify the Company against such liens or claims.

The final payment shall be made subject to release after the completion and acceptance of the work included in this contract. The Contractor shall furnish to the Company *of* the Engineer, if deemed necessary by the Engineer, all releases or waivers of liens, claims or right of claims of said Contractor, and of sub-contractors, and of all persons furnishing material or labor hereunder, who might have a lien therefor. Should there prove to be any claim after the final payment is made, the Contractor shall refund to the Company all moneys that the latter may be compelled to pay in discharging any lien or claim on said premises arising from the work done on property, or material furnished hereunder, the Contractor to refund such amount to the Company before the bond covering the work is declared released.

195 It is further mutually agreed between the parties hereto that no estimates given or payments made under this contract, except the final certificate *or* final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Article XI. Wherever in this contract the term "Contractor" is used it represents the party of the first part to this agreement; and the term "Company" represents the party of the second part.

Wherever — this contract the term "Engineer" is used it is understood (unless otherwise specified) to mean the Chief Engineer of the Company or his duly authorized agents, limited by the patricular duties entrusted to them.

Article XII. The Contractor shall supply the Company with a good and sufficient bond, acceptable to the Company, to the amount of Fifty Thousand Dollars for the faithful carrying out and completion of this contract, including the clause stipulating the number of teams, etc., to be brought to the work, and the dates on which they are to be brought, and the bond shall remain in force until ninety days after the final payment is due.

Article XIII. The Contractor assumes all responsibility for any loss or damage that may happen to said work *on* to the materials therefor, or for any injury to the workmen or to the public, or to any individual, or for any damage to the Company or other parties, adjoining properties, and in case of accident and suit occurring

196 on same, he is to defend the suit in person and relieve the Company from all cost and expense and pay any judgment that may be recovered therein.

It is further agreed that the Company shall not in any manner be answerable or accountable for any violation of State *of* Municipal Laws or Ordinances as far as they may be applicable to the carrying out of the work. The Contractor shall indemnify the Company against any such loss *of* damage or consequences of violation of any such laws or ordinances. This article, however, shall not be construed as requiring the Contractor to remove slide or replace washed material due to fresh*l*ets, at his own cost.

Article XIV. The said parties, for themselves, their heirs, executors, administrators, assigns, and successors, do hereby agree to the full performance of the covenants herein contained.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

JACKSON CONSTRUCTION CO.,
By R. M. HALL, *Pt.*
J. W. WRIGHT, JR.

Signed, Sealed, and delivered in the presence of,
MIKE HARVEY.
C. J. PARAMORE.

197 *Specifications for Grading, etc.*

1. Under the head of grading shall be included all excavations and embankments of the formation of the roadbed for single track, and all necessary turnouts and side tracks; also the preparations for all such depot grounds, sites for water stations, etc., as shall be required by the said Chief Engineer. The digging of all ditches, changing the direction of streams and water courses, cutting down or raising any highways or private way, excavations of all foundation pits above water and all other excavations and embankments, in any way connected with, or incident to, the construction of the railroad.

2. The Contractor shall be responsible for the preservation of all stakes set.

3. As far as reasonably possible, the embankment shall be constructed with material taken from the excavations. The Contractor shall be required to dispose of his material in accordance with the directions of the Chief Engineer. Earth excavations shall be hauled 500 feet where directed by the Chief Engineer, without extra compensation. Payment will be made for each cubic yard hauled beyond 500 feet, for each 100 feet for overhaul.

4. In filling over culverts and backing up masonry great care should be taken to avoid distributing the same. Only the best material procurable in the neighborhood shall be used, and if filling over culverts the embankment shall be carried up in layers of uniform depth, so as to give as uniform pressure as possible to the culverts.

198 2. Extra land necessary for borrow pits and waste banks shall be purchased by second party.

6. All material shall be measured and paid in for excavation, except where borrow pits are taken out in such shape as, in the judgment of the Chief Engineer, renders accurate Measurements impracticable, in which case the borrowed material may be measured in embankment.

7. Excavations shall be taken out with fourteen (14) foot base and slopes of one to one, except where otherwise instructed or agreed to by the Chief Engineer.

8. Embankments shall have a 12 foot crown and one and a half to one slopes, except where otherwise instructed or agreed to by the Chief Engineer.

9. When excavations are wasted or put in spoil banks, it shall not be deposited nearer than ten feet of the slope stakes unless by written permission of the said Chief Engineer.

10. When directed by the Chief Engineer of the Company excavations shall be hauled to such distance as he may direct.

11. All excavations shall be taken out of the plane to true measured prism, i. e., no projection will be allowed beyond the true plane of the slopes toward the center line. Material from slides however, shall be measured and paid for.

12. Ditches.—In excavations, a ditch on each side shall be made two (2) feet wide on top.

13. All ditches must be at least one (1′) foot deep.

199 14. Solid rock excavations will be taken out one (1′) foot below grade and filled in again to the true grade line with such material, other than crushed rock, as the Chief Engineer may select for roadbed within five hundred (500′) feet.

15. Embankment.—When necessary, in the judgment of the Chief Engineer, all earth shall be borrowed on one side of the roadbed or the width of the berme be increased, free of extra charge, unless the work be done with "graders" or by other means which would render the requirements an unnecessary hardship in the judgment of the Chief Engineer.

16. As far as possible, embankments shall be started at the base of the full width indicated by the slope stakes and built to the true slope, without widening with loose material from the top.

17. Ditches.—All ditches, such as track ditches, surface ditches, drainage ditches of all kinds, and changes of channels shall be excavated as ordered under the direction of the Chief Engineer and without extra charge over contract price, and shall be considered as a part of the roadway at the point or opposite the point where the work is done, and shall be deposited in embankments.

18. Classification.—There shall be no classification of material of any kind.

19. Measurements will be made by the cubic yard of 27 cu. ft. from true measured prisms indicated by the cross section notes or slope stakes of the Engineer. When measurement is made on embankment, a fair and equitable deduction for shrinkage will be made in making estimates.

200 20. Clearing.—The right of way shall be cleared for at least fifty (50′) feet each side of the center line, or, if the

Chief Engineer shall so direct, the full width of the right of way. All trees, stumps, undergrowth, and brush within such clearing must be cut so the tops of same shall not be over twelve (12″) inches above the surface of the ground.

21. All remaining trees, brush, logs, or other perishable materials, if not the property of the adjoining land owner, shall be cut, piled and burned, or otherwise disposed of from off the right of way. If the said trees, logs and other material are the property of the adjoining land owner, they shall be burned, removed, or otherwise disposed of, as directed by the Chief Engineer.

22. No allowance will be made for cutting and removal of grain, grass, weeds, or other annual plants on right of way, the contract price for grading being assumed and understood to cover such items.

23. Grubbing and clearing will be considered as one item, and paid for by the acre actually cleared.

24. Grubbing.—All roots, stumps, and grubs bust be removed as ordered by the Chief Engineer.

25. Generally grubbing will be done in excavations under embankments two (2′) feet or less in height, where grubbing is necessary, and wherever else the Chief Engineer may direct.

26. The Contractor must undertake to provide outfits, forces, and equipment equivalent to the following schedule:

201 On or before April 22nd, 1911, not less than 20 teams, or equivalent thereof;

On or before May 10th, 1911, not less than 20 teams additional or equivalent thereof;

which said forces he must agree to maintain continuously at all times on the work covered by these specifications, until completion of the said work.

Nothing in this paragraph, however, shall be construed as prohibiting the *constructor* from putting said forces, or any of them, on the work at earlier dates than those hereinabove set forth.

While it is estimated that the work may be fully completed with these forces by the expiration of 6 months from date hereof, it is understood in advance that the maintenance of the forces is the ruling feature in the completion of the work, whether the said completion be at an earlier or later date than above mentioned. The above figures have been arrived at on the assumption that there will be approximately 450,000 cubic yards to handle. Should the quantities be found less when the location *provides* are completed, a proportional reduction in total number of teams will be permitted.

27. Free transportation will be provided over the line of the Railroad Company's road for men and material destined for the work herein covered.

28th. Track Laying.—Track to be laid with — pound rail, full tied, bolted, and spiked with 2640 ties per mile, together with such switches and sidings and railroad crossings as may be determined upon. Track to be brought to a perfect line in accordance with centers as given by the Engineer. Ties to be brought to a

202 perfect line on the line side (South side) on tangents, and on curves the line shall be transferred to outer side of curve. All ties shall be accurately spaced and at right angles to rail. Elevation of outer rail on curves shall be as directed by the Engineer.

29. Surfacing.—Surfacing shall consist in each tie being thoroughly tamped from end of tie to a point one foot on inside of rail, the centers being slightly tamped or shuffled. Track is to be brought to a perfect surface as per final grade line established by the Engineer, and indicated by grade stakes set at intervals of 100 feet. The raise in no place shall exceed 6/10 of a foot. The track shall be ballasted with earth obtained from cut ditches in excavations or by widening cuts. In no case shall the Contractor be allowed to "rob" or take material from the crown of the embankment or from berms. The Contractor shall be required to furnish steel shims for expansion of such thickness as the Engineer may direct from time to time. Track to be dressed in accordance with diagram furnished by the Engineer. All cut ditches shall be left in uniform condition, free from holes so that drainage shall not be impaired.

It is the intention of the above specifications to obtain a first-class track in every particular, both as to surface and alignment.

MIKE HARVEY,
Chief Engineer.

203 *Decree on Motions and Exceptions.*

Entered Nov. 8, 1915, M. B. 26, Page 89.

J. W. WRIGHT, JR.,

vs.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY et al.

Be it remember- that this cause cam- on to be further heard on August 13, 1915, upon the separate written motions of the defendants, Birmingham & Northwestern Railway Company and the Jackson Construction Company, also a cross-complainant, to have the Court set aside the verdict and findings of the jury as to certain issues submitted to the jury and to grant them a new trial as therein set forth, the said separate written motions of the Jackson Construction Company and the Birmingham & Northwestern Railway Company having been respectively filed with the Clerk and Master of this Court on August 13th, 1915, and to which said separate motions for a new trial reference is made for particulars, and also upon the written exceptions of the complainant and cross-defendants, Mrs. Susie E. Wright Adm'x of J. W. Wright Jr., deceased, to the findings of the jury in certain particulars, which said written exceptions of the complainant and cross-defendant were also filed with the Clerk and Master on August 13, 1915, and to which reference is made for particulars.

By express order of the Court said separate motions for a new

trial and said exceptions to the findings of the jury need not
204 be copied on the minutes of the Court, but reference to the same in this order and decree being hereby declared to be sufficient, and the same as filed being now marked Exhibits A, B, and C to this decree and as so identified they are by order of the Court, made and hereby declared to be a part of the record in this cause.

And having heard said separate motions for a new trial filed in behalf of the defendants, Birmingham & Northwestern Railway Company, and the defendant and cross defendant Jackson Construction Company and the exceptions filed in behalf of the complainant and cross-defendant, and also having heard the argument of counsel thereon, it is ordered, adjudged and decreed that the verdict and findings of the jury in response to issues number- four, ten, twelve, thirteen, fourteen and so much of verdict as to issue number eleven as answers "none" be and the same are hereby set aside and for nothing held, and a new trial is granted as to said issues Nos. four, ten, twelve, thirteen, fourteen and so much of the verdict as to issue number eleven as answers "none" but the findings of the jury as to issues Number- one, two, three, five, six, seven, eight, nine and so much of the verdict as to issue number eleven, as answers "yes" are not set aside and no new trial is granted as to said issues.

To the action of the Court in setting aside the findings of the jury, and in granting a new trial, otherwise than as was sought and prayed for in the separate written motions filed by them, the said Birmingham & Northwestern Railway Company and the said Jackson Construction Company, severally excepted.

205 To the action of the Court in overruling her exception to the verdict and findings of the jury as to issue No. 2, and in refusing to set aside said verdict and finding of the jury, the complainant excepts.

Further, to the action of the Court in sustaining the exceptions or motion of the defendants and in setting aside the verdict and finding of the jury as to issue- Nos. 4 and 10 the complainant excepts.

To the action of the Court in overruling the exceptions of the complainant to that part of the verdict and finding of the jury on issue No. 11 wherein they answered "yes," that is, that said J. W. Wright Jr. breached his contract, the complainant excepts, and complainant also excepts to the action of the Court in sustaining the motion and exception of the defendants to that part of the verdict and finding of the jury, wherein the jury answered "none," that is, that the Construction Company was not damaged by the alleged breach of the contract by Wright.

Complainant further excepts to the action of the Court in sustaining the exceptions or motion of the defendant- to the verdict and finding of the jury upon issues 12, *14*, and 14 and granting the defendants a new trial upon said issues.

And thereupon the cause came on to be further heard upon the joint and separate motions of all the defendants for a final decree dismissing complainant's original, amended and supplemental bills,

and upon motion of complainant and cross-defendants to dismiss the cross-bill of the Jackson Construction Company in so far as any affirmative relief was sought and prayed for as against the complainant and cross-defendant, Mrs. J. W. Wright Jr.,
206 Adm'x said motions being based upon the findings of the jury as approved by the Court and as to which no new trial was by the Court granted, and the Court having heard the argument of counsel thereon was pleased to take the same under advisement to be decided at some future day of the term.

This order and decree was by the Court made on August 13th, 1915, and should have been entered on the minutes of that date, and is by the Court now ordered to be entered nunc pro tunc.

To the action of the Court in allowing the foregoing decree to be entered as of August 13th, 1915, the complainant, Mrs. Susie E. Wright, Administratrix of J. W. Wright Jr., deceased excepts.

Upon application of the complainant she is allowed thirty days from the 8th day of November, 1915, within which to prepare and file a bill of exceptions.

207 *Decree of Court Dismissing Original and Supplemental Bills and Cross-bill as to Recovery on Contracts.*

Entered November 8th, 1915, M. B. 26, P. 92.

J. W. Wright, Jr.,

vs.

Birmingham & Northwestern Railway Company et al.

Be it remembered that this cause came on to be further heard on this the 8th day of November, 1915, upon the joint and separate motions of the defendants, Birmingham & Northwestern Railway Company, the Jackson Construction Company and R. M. Hall, to have the original amended and supplemental bills filed by the complainant, J. W. Wright, Jr. dismissed, and upon the motion of complainant to dismiss the cross-bill of the Jackson Const-uction Company filed in the cause.

And it appearing to the Court that the said J. W. Wright, Jr. at the time of the making and execution of the contracts with the Jackson Construction Company, sued upon in this cause had not paid the privilege tax required to be paid by him by law and that for that reason his administratrix in whose name this cause has been revived is not entitled to maintain said action in so far as any relief is sought by virtue of said contracts the Court so adjudges and decrees.

It is therefore ordered, adjudged and decreed that the original, amended and supplemental bills in this cause, in so far as any relief is sought thereunder by virtue of the contracts sued upon therein be and the same are hereby dismissed, and said ad-

208 ministratrix will be taxed with all the cost incident to the filing of said bills in so far as relief is sought under and by virtue of said contracts.

And it further appearing to the Court that the Jackson Construction Company at the time of making said contracts had not paid the privilege tax required by law to be paid by it, it is therefore upon motion of complainant and cross-defendant for that reason to have said cross-bill dismissed, ordered, adjudged and decreed that said cross bill be and the same is hereby dismissed in so far as any relief is sought thereunder by virtue of said contracts and said Jackson Construction Company will be taxed with all the cost incident to the filing of said cross-bill in so far as relief is sought under and by virtue of said contracts.

It is therefore further ordered, adjudged and decreed by the Court that the defendants named above have and recover of Susie E. Wright, administratrix of J. W. Wright Jr. and Fidelity and Deposit Company of Maryland and C. E. Pigford and R. E. L. Cope, sureties on complainant's prosecution bonds, all the costs above adjudged against said administratrix, and that said administratrix have and recover of Jackson Construction Company and I. B. Tigrett and R. M. Hail, sureties on its prosecution bonds, all the cost above adjudged against said Jackson Construction Company, for which said recoveries for cost let execution issue as at law.

And it further appearing that by former decree in this cause of date August 13th, 1915, a new trial has been granted as to certain issues submitted to the jury upon the trial of the cause, it is therefore ordered, adjudged and decreed that as to the respective motions of the respective parties hereto, to have the original, amended and supplemental bills of complainant and cross-bill of Jackson

209 Construction Company dismissed respectively as to grounds than as otherwise herein before set out, the action of the Court is reserved until the further hearing of this cause.

To the action of the Court in dismissing complainant's original, amended and supplemental bills against Jackson Construction Company and R. M. Hall, or either of them, and to the action of the Court in dismissing so much of said bills against Birmingham & Northwestern Railway Company as seeks a recovery under said contracts with Jackson Construction Company the complainant excepts.

From so much of the above decree dismissing complainant's original, amended and supplemental bills as to the defendants Jackson Construction Company, and R. M. Hall, and from so much of the same as dismisses said bills as to Birmingham & Northwestern Railway Company on recovery for breach of contract with said Jackson Construction Company and R. M. Hall, the complainant prays an appeal to the next term of the Supreme Court to be held at Jackson, Tennessee, on the first Monday in April, 1916, which is granted upon complainant giving bond with security as required by law and for satisfactory reasons appearing to the Court the complainant is allowed thirty days from this date within which to make and file said bond and to prepare and file a bill of exceptions.

210 *Bill of Exceptions.*

Filed Dec. 8, 1915.

J. W. WRIGHT, JR.,

vs.

B. & N. W. RY. Co. et al.

Upon the trial of this cause the following proof was introduced as bearing upon the question of the payment of privilege tax required by law to be paid by construction companies and persons engaged in construction work, and upon the question of J. W. Wright Jr.'s liability for such a tax, to wit:

Mrs. SUSIE E. WRIGHT, a witness for complainant, after being first duly sworn, upon examination testified as follows, to wit:

Direct examination.

By Mr. Key:

1 Q. This is Mrs. Susie E. Wright?
A. Yes sir.
2 Q. Where do you live?
A. Union Springs, Alabama.
3 Q. How long have you been living there?
A. Nearly fifteen years.
4 Q. Were you the wife of Mr. J. W. Wright, Jr., during his lifetime?
A. Yes sir.
5 Q. And now his widow?
A. Yes sir.
211 6 Q. Have you qualified as administratrix of his estate in Tennessee?
A. I have.
7 Q. When did Mr. Wright die?
A. The 28th of March, 1913.
8 Q. Where was his home at that time?
A. Union Springs, Ala.
9 Q. How long had he been living at Union Springs?
A. Nearly fifteen years.
10 Q. Did he or not have his office there?
A. That was his head office.
11 Q. What business was he engaged in?
A. Contracting business.
12 Q. What kind of contracting business?
A. He built railroads and highways.
13 Q. I will ask you whether or not all of his work was done from that point, if that was his home office?

A. That was his head office.
14 Q. Did he take his contracts from that point and let his contracts from there?
A. Yes sir.
15 Q. Did he or not have an office building?
A. He had an office.
16 Q. Did he own the building in which his office was located?
A. I did.
17 Q. Did Mr. Wright own his own home there?
A. I owned the home there.
18 Q. Did Mr. Wright have his stationary printed?—stationary used for the transaction of his business?
A. It was printed in Union Springs.
19 Q. Is that some of his stationary? (Handing witness
212 a letterhead.)
A. Yes sir.
20 Q. There seems to be a difference in these letter heads, is that one he had printed and used?
A. Yes sir.

Said letter head was introduced in evidence and is marked as Exhibit 'A' to Mrs. Susie E. Wright's testimony and this Bill of Exceptions and is as follows:

J. W. Wright, Jr.,

General Railroad Contractor.

Home office: Union Springs, Ala.
Present address: ——.

——, —, 191–.

Exhibit 'A' to Mrs. Susie E. Wright'- testimony and Bill of Exceptions.

J. W. ROSS, *Chancellor.*

21 Q. Did he use this also? (Referring to another letter head.)
A. Yes sir.

Said letter head was introduced in evidence, and is marked Exhibit "B" to Mrs. Susie E. Wright's testimony and this Bill of Exceptions and is as follows:

J. W. Wright, Jr.,

General Contractor.

Home Office: Union Springs, Ala.
Present Address: ——.

——, —, 191–.

Exhibit "B" to Mrs. Susie E. Wright'- testimony and Bill of Exceptions.

J. W. ROSS, *Chancellor.*

213 22 Q. He did business at various points in the railroad and road construction business?

A. He did.

23 Q. Did he have any other work in Tennessee at the time of the work on the B. & N. W. R. R.?

A. No.

24 Q. What other states did he do business in besides Alabama?

A. In Tennessee, in Georgia, in Mississippi, and Louisiana, and South Carolina.

25 Q. And all those contracts were taken from the home office?

A. Yes sir.

26 Q. Of what state was he a resident and Citizen?

A. Alabama.

27 Q. Was that for fifteen years prior to his death?

A. Nearly fifteen years.

Cross-examination.

By Mr. Spragins:

1 Q. You say other contracts were taken from his home office, you don't know personally where he took the other contracts?

A. I think I know.

2 Q. Were you there present when they were taken?

A. A great many, I was there. His bid- were made out there at home, I helped him with the work a great deal, and have helped him make out bids.

3 Q. He would take those bids and go to the State where the work was to be let, and take the contract?

A. He didn't always do that, he would mail out bids from the office.

214 4 Q. Where the work was very important, he would go in person, like he came to Tennessee for this?

A. Not always. The bids were made in the office, and a copy of the bid kept there in the office, and the original bid mailed out where the work was.

5 Q. Do you mean to say he didn't go personally to take the job?

A. He would go and look after the work.

6 Q. That isn't the question I asked you, do you mean to say he didn't go in person to close the contracts?

A. No.

The Court: I don't understand whether you meant he did not go or to say he did.

A. He would go to the work and go over it and look over the work and say what he felt like he could do the work for, and go back to the office and make out the bid, the original bid was mailed in to the office, and he would keep a copy of it at the office. If I understand the question, that is the answer, the best I know.

7 Q. When he sent that bid, he would follow that up and close the contract at the place where the work was let?

A. I don't know that I can tell you that exactly, so many times I know he would get the work, and I myself have received some of them.

8 Q. You would only know for yourself that he would get the work?

A. I have received the letters myself.

9 Q. All of them?

A. No, not all of them.

10 Q. The cases he would handle himself, you don't know how he took them, except when he was there?

215 A. He was generally at the office when he took the contracts,—I was there with him and helped him in the office a great deal.

11 Q. You know as a matter of fact that he was here in Tennessee and close- the contract for thus work in this State, do you not?

A. I think if the contract is looked at, it will show on the face of the contract where it was closed.

12 Q. I am asking for your knowledge?

A. I couldn't say that.

13 Q. I am saying, your business was run on that basis?

A. I wasn't always there when every contract was closed, but I think if you will look over the contract you will find out where every contract was closed.

14 Q. Have you those contracts with you?

A. I guess the lawyers have.

15 Q. You are stating only those that you know were closed in the office?

A. I am stating what I know.

16 Q. Those closed elsewhere, you don't say of your own personal knowledge?

A. I don't know where they were made, but I know his mode and method of conducting business, and I just know it was done right.

17 Q. It was also his mode and method of doing business to put his property in your name, was it not?

Objected to as immaterial. Objection sustained.

18 Q. He had a partner in business, didn't he?

A. No.

19 Q. Didn't he have a silent partner in business?

A. No.

20 Q. Did he own his own teams and equipment?

216 A. Yes, sir.

21 Q. Owned them at the time of his death?

A. Yes.

22 Q. All along?

A. Yes.

23 Q. You say he had no other work in Tennessee—do you know that of your own knowledge?

A. At the time of his death he had no other.

24 Q. He had done other work in Tennessee?

A. He has done.

25 Q. What other counties?
A. It was before I knew him. He has done work in Tennessee on this N. C. & St. L. road with Capt. L. Wright, who had charge of the work and he worked.

Cross-examination.

By Mr. Timberlake:

1 Q. Where were you in April, 1911?
A. I was at Union Springs.
2 Q. Alabama?
A. Yes.
3 Q. You weren't in Jackson, Tennessee. I am asking where you were?
A. I couldn't answer right off. I came here while he was doing this work, was here a few days.
4 Q. That was after the contract had been made?
A. Yes, he was at work here.
5 Q. You weren't present when the contract with Jackson Construction Company was made, were you?
A. I can't say I was.
6 Q. Don't you know you were not?
217 A. No, I don't know I wasn't, and I don't know I was.
7 Q. Where was that contract made?
A. No, I can't say to that.
9 Q. Your husband was in Jackson, Tenn., in April, 1911?
A. He was here most all the time, when he had taken this work.
10 Q. He came to Jackson for the purpose of getting the contract?
A. He came here to do this work.
11 Q. Didn't he come to Jackson for the purpose of submitting bids and getting the contract?
A. He came here and looked over this work and went home and discussed it and I tried to persuade him not to do it, because it was too far from him, then he did take the work.
12 Q. Did he come back to Jackson after you discussed it?
A. I can't say.
13 Q. He left home?
A. Yes, but he was away from home most of the time.
14 Q. He hadn't got the contract when you were trying to keep him from taking it?
A. He hadn't signed up the contract.
15 Q. He hadn't made any bid on it at that time?
A. No, he hadn't bid on the work, after the railroad bid goes in, if your figures are the lowest or considered the best, you can't turn it down, you have to do it.
16 Q. In April, 1911, and during the remaining portion of that year Mr. Wright you say, had some contracts at other places than this B. & N. W. Railroad?
A. Yes, he had work at other places all the time he had this.
17 Q. Where?
A. He had work in Mississippi.

218 18 Q. At what place in Mississippi and what was the nature of the contract?

A. I can't tell you the wording of that contract.

19 Q. I didn't ask you the wording, but the nature of the work?

A. He was building a logging road to a milling camp.

20 Q. What portion of Mississippi?

A. Down in the southern part.

21 Q. Do you know when he took that contract and began the work?

A. I can't give you the date.

22 Q. It was during the time he was here?

A. Yes. while he was here.

The Court: Was that logging track one on which teams was to be used or engines?

A. Engine.

23 Q. What other place was he at work while the work was going on here?

A. That is all I can call right now, he did have other work while he was at work here.

24 Q. What was the other work he had?

A. He had some at La Grange, Ga.

25 Q. What was the nature of that work?

A. He had road work, and graded a factory site, I think.

26 Q. Any other work that he was doing at that time?

A. That is all I remember at that time.

27 Q. So he had three contracts at the same time, one in Georgia, one in Mississippi and one in Tennessee?

A. No, he had one in Tennessee, one in Mississippi, completed the work in Mississippi and went to Georgia.

219 The Court: You spoke of his *his his* building a road,—what kind of road did he build at La Grange, Ga?

A. He was doing highway work.

The Court: That was building roads and bridges for highway purposes?

A. Yes, sir.

28 Q. Do you know Mike Harvey?

A. I do.

29 Q. How long have you known him?

A. Several years.

30 Q. How long was Mike Harvey in the employ of Mr. Wright, your husband, before Mr. Wright came to Jackson?

A. He wasn't in Mr. Wright's employ.

31 Q. Do you mean to say to this jury that Mr. Harvey was never in Mr. Wright's employ?

A. I can't call a time that Mr. Harvey was in his employ, he had been the railroad engineer on other work, but not Mr. Wright's engineer, he frequently had any engineer himself.

32 Q. Mr. Wright did?

A. Yes, he didn't keep an engineer all the time, but he did employ engineers at different times.

33 Q. Do you say to the jury that Mr. Wright had never had Mr. Harvey in his employ at any time?
A. I don't say that. Not in my knowledge.
34 Q. The other work which Mr. Wright had a contract for, in which you say Mr. Harvey was the engineer for the railroad, what work was that?
A. At West Point, Ga.
35 Q. Do you know what road they were building, and what work they were doing?
220 A. Yes sir, building a railroad.
36 Q. Do you know the name of it?
A. I can't tell you the name of it. I think we have a copy of the contract here.
37 Q. And that was before he came to Jackson?
A. Yes.
38 Q. How long before?
A. I am bad on dates, I can't remember.
39 Q. If you have the contract, refresh your memory as to the name of the road and the time he was at work on it?
A. I can't recall the name of the road.
Mr. Cope: If we have the contract here, I don't know it, that was several years ago.
A. It has been sometime ago that Mr. Wright worked there, I don't remember those dates.

Counsel for the defendant Hall excepted to the testimony of the witness with respect to complainant's custom in making other contracts, except the one in question. Objection sustained, to which complainant excepted.

GEORGE H. PALMER, a witness for complainant, testified, in part, as follows:

Direct examination:

Q. Did you know J. W. Wright, Jr., in his life time?
A. I did.
Q. How long had you known him?
A. Before he came on this job, I merely met him, had been introduced to him at the hotel in La Grange, Ga.
Q. Did you know about him?
A. At the time he was regarded as one of the biggest contractors in the south, in railroad work.
221 Q. Where was his business located?
A. At Union Springs, Ala.
Q. Did he maintain an office there?
A. He did.
Q. What office did he maintain there?
A. His head office.
Q. That was his headquarters?
A. Yes sir.

Q. How extensively was J. W. Wright Jr. engaged in the construction work?

A. I couldn't say positively, but my belief was he had a whole lot of work going on.

Q. What is your information about it?

A. I know he did.

Q. When did you leave Jackson, Tennessee?

A. Sometime in March, 1912.

Q. Did you go with Mr. Wright to Union Springs, Ala. or to other work after you left here?

A. No sir, I went with him to Union Springs, about a day and a night.

Q. Did he have other work at his office?

A. He had work there at his office,—had an office.

Q. What other jobs did he have going on at the time?

A. He had this one here,—he had work at Century, Fla., there about that time, the North Georgia Work, in and around Gainesville, Ga.

Q. What was the Florida Work?

A. It was Florida-Alabama work, it was a contract with the Alger-Sullivan Lumber Co., with headquarters at Century, Fla.

222 Q. You say that was a logging road?

A. Yes sir. Built for that purpose so far as I know.

Q. Did you go down there?

A. No sir.

Q. A log road, for operating steam locomotives?

A. Yes sir.

Q. Where was the other work?

A. He had a job in North Georgia, whether that was in operation, I don't know, I think it was in operation sometime in April.

Q. What other work did he have going on when he first came to Jackson in 1911?

A. All I can recall was for the Central Georgia and Birmingham whether that was his work, I don't know. I believe the contract was in R. H. Wright's name.

Q. Did they work together?

A. Yes sir, sometimes they did, and sometimes they didn't.

Q. Did they work as partners on any job together?

A. Not that I know of.

Q. Did Mr. Wright have a silent partner in his business?

A. Not that I know of.

Q. As Auditor, it was your duty to keep the books?

A. I wasn't the bookkeeper, I was one to see they were kept.

Q. Who was the bookkeeper?

A. A man named Bryan for a while, and a man named Holt for a while.

Q. You looked after the books, the receipts and disbursements?

A. Yes sir.

Q. You had charge of the expenditures?

A. Yes sir.

223 Q. Did you draw the checks?
A. For a while I countersigned the checks, and for a while I wrote the checks as auditor.
Q. You also did the typewriting?
A. Yes sir.
Q. Did Mr. Wright have an office here any where?
A. Yes sir.
Q. Where was that?
A. His office in Jackson, Tennessee was down at the camp where the depot is and the same thing between Alamo and Bells—and in Jackson had another office in a house down by the side of the railroad, as near as possible to his operation. Tried to locate his office as near as possible to his operation.
Q. The office located near Jackson was the office from which he managed and conducted the business of building the railroad?
A. He had it here a while and then moved it down to Alamo.
Q. So he didn't keep it here all the time?
A. No sir.
Q. Did he move it anywhere else after it was at Alamo?
A. Yes sir, Friendship.
Q. You were in charge of it at each place?
A. Yes sir.
Q. Attended to the correspondence?
A. Yes sir.
Q. You wrote practically all of these letters introduced here?
A. Yes sir.

R. F. SPRAGINS, witness for defendants, testified that he was a member of the law firm of Biggs and Spragins during the
224 year 1911, that the bid of J. W. Wright Jr. on the building of the railroad of the B. & N. W. Ry. Co. was prepared in Jackson, Tenn. by said Wright, and submitted by him in person; that when the final bid of said J. W. Wright Jr. was accepted the written contract was then drafted and signed by the Jackson Construction Company and J. W. Wright Jr. in Jackson, Tenn. and on the day it bears date; that the latter part of April or the first of May 1911 the said Wright shipped a large part of his equipment to Madison and Crockett Counties, Tennessee, and commenced work on said railroad during the months of April or May; that in November 1911 the said Wright threatened to throw up his contract and abandon his work on said railroad unless he was paid more money or released from certain features of the contract, and thereupon after considerable discussion the supplemental contract of November 14, 1911, was entered into and signed by said J. W. Wright Jr. in Jackson, Tennessee; that while his work of constructing said railroad was going on in this county, the said J. W. Wright Jr. kept or maintained an office in this county near the B. & N. W. Ry. Co. depot in a hut or box car in which office he kept an auditor and bookkeeper, and from which correspondence was carried on relative to said work and said work directed; that when the said office was removed to Alamo or Friendship, Mr. Wright, while he was in Jackson, Tenn. which

was periodically, kept or occupied a room in the Southern Hotel in or from which he directed and conducted said construction work etc.

E. W. WRIGHT, witness for defendants, testified, that he was one of the sub-contract-s under J. W. Wright Jr. in constructing a portion of the railroad of the B. & N. W. Ry. Co., that J. W.
225 Wright Jr. solicited the said witness to come to Madison or Crockett County, Tennessee, for the purpose of taking over a portion of said construction work and said J. W. Wright Jr. stated to witness that he, J. W. Wright Jr. had a splendid contract and that another railroad was to be constructed out of Jackson, Tenn., and he, the said J. W. Wright Jr. expected to get the contract for building that railroad too, and that it would be about ready for construction as soon as the work on the B. & N. W. Railroad was completed, that witness came to Tennessee to inspect the work and his contract with J. W. Wright Jr. to construct a part of said B. & N. W. Railroad was entered into and signed in Tennessee; that in addition to having his own construction force and teams and equipment while working on the construction of said railroad, the said J. W. Wright Jr. also employed and contracted with a large number of sub-contractors who performed a large part of said construction work.

W. H. BIGGS, a witness for defendant-, was introduced and testified as follows:

That he was a member of the firm of Biggs & Spragins, Attorneys for Birmingham & Northwestern Railway Company, and that in 1911, when the original contract sued on in this case was executed, and before the contract was made and the bid of J. W. Wright Jr. accepted, that the said J. W. Wright Jr. was in Jackson Tenn. and came to Jackson, Tenn. for the purpose of submitting a bid to Jackson Construction Co. for the building of said B. & N. W. Railroad. That the first bid submitted by Wright was one of four bids, there being two bids lower than the bid submitted by Wright, originally, and the one higher. That these four bids were opened one night
226 in the office of Biggs & Spragins, in Jackson, Tenn., Mr. J. W. Wright Jr. being present, that the bids were not accepted that night, but the matter continued over unto the next day, and the next day all the parties again met in the office of Biggs & Spragins in Jackson, Tennessee, when Mr. Wright, in person, submitted a new bid which was lower than the first bid submitted by him, and none of the other parties made any further bids, whereupon the last bid submitted by Wright in person, and which was prepared in Jackson, Tenn., and submitted in Jackson, Tenn. was accepted by the Jackson Construction Company and the contract, exhibit 'A' to the bill was then and there prepared upon said bid so accepted, and was then and there, in the office of Biggs & Spragins in Jackson, Tenn., signed by J. W. Wright Jr.. and Jackson Construction Company.

J. A. THOMPSON, a witness for the defendant- was introduced and testified that he was the County Court Clerk of Madison County, Tennessee, and that the records of his office showed that J. W. Wright Jr., had never paid but one privilege tax which was for constructing railroads and that said payment was made on the 14th day of March, 1912, and that said payment amounted to the sum of $5.50 for State and County tax and fees incident thereto, and that by direction of said Wright or his attorney the license was dated back so as to cover on the face of said license from the 1st. day of May 1911 to the 1st. day of May 1912.

R. L. CONYERS, a witness for the defendant- was introduced and he testified that he was the County Court Clerk of Crockett County Tennesse, and that the records of his office showed that J. W.
227 Wright, Jr., had never paid but one privilege tax which was for constructing railroads in Crockett County Tennessee, and that said payment was made on the 18th day of March, 1912, and that said payment amounted to the sum of $5.50 for State and County tax and fees incident thereto, and that by direction of said Wright or his attorneys the license was dated back so as to cover on the face of said license from the 1st day of May, 1911, to the 1st day of May, 1912.

J. W. MENZIES, a witness for the defendant- testified that he was the County Court Clerk of Dyer County Tennessee, and that the records of his office showed that J. W. Wright Jr. had never paid but one privilege tax in Dyer County Tennessee, which was for constructing railroads and that said payment was made on the 15th day of March, 1912, and that said payment amounted to the sum of $76.50 for State and County tax and fees incident thereto and that by directoin of said Wright or his attorney the license was dated back so as to cover the face of said license from the 1st day of May, 1911 to the 1st day of May, 1912.

R. M. HALL, one of the defendants, testified that when the contract for this work was to be let, advertisement was made for bids upon the same and at the opening of the bids there were four bidders and the bid of J. W. Wright Jr. was the highest bid, except one, and all of the bids were rejected and new bids asked for and upon the second opening of bids the contract was awarded to J. W. Wright Jr. He further testiried that J. W. Wright Jr. came to Jackson, Ten-
228 nessee, to look over the ground before bidding, submitted his bid while here, was back at Jackson, Tennessee at the opening of the first bids, and was here and submitted his second bid, and was present at the opening of the same, and that he was here in Jackson Tennessee when both the original and supplemental contracts were entered into and the said contracts were signed by the parties in Jackson Tennessee.

The evidence further showed that J. W. Wright Jr. after the original contract was made at once brought teams and implements

for railroad building to Jackson, Tennessee and to other points on and along the proposed line of railray from Jackson in Madison County Tennessee, to Dyersburg in Dyer County, Tennessee; that he opened an office at the beginning of the construction work in Jackson, Tennessee, near the depot of the Birmingham & Northwestern Railway where the same now is, which office he maintained for a considerable portion of the time while the work of constructing said railroad was being done and from which office he transacted the principal portion of the business of constructing said railway; that after closing the office near the depot in Jackson, Tennessee, he procured a room at the Southern Hotel in Jackson, Madison County Tennessee, from which he conducted correspondence and attended to various matters pertaining to the construction of said railway; that during a portion of the time while his office was located near
229 said depot in Jackson, Tennessee, and after closing said office at said point he maintained offices in Crockett County and in Dyer County, Tennessee, on and along said proposed line of railway, but that he spent the greater part of the time during the construction of said road at Jackson, Tennessee, from which the principal part of the business of constructing said road was transacted, that he had an auditor who kept the books pertaining to said railway business at Jackson, Tennessee, either in the office near the depot or in the room at the Southern Hotel and that said auditor when said Wright was away from Jackson was in daily communication with him relative to the business of constructing said road, that in said offices were kept the records relative to the constructing of said railway during the construction thereof; that the sub-contracts were made in said offices, all of which matters were transacted either by the said J. W. Wright Jr. in person or by his auditor, agents, or employes and that most of the work done in the constructing of said railway was performed during the year 1911 when he had such offices either in Madison Crockett or Dyer Counties, Tennessee, but that as above stated the principal part of the work of superintending the construction of said road and the making of said contracts was transacted in Madison County Tennessee, during said period.

230 This was all the evidence upon the privilege tax question and the question of J. W. Wright Jr. liability therefor.

The complainant tenders this as her bill of exceptions upon the question of the payment of privilege tax and the liability of her intestate for the same by reason of his building of the Birmingham & Northwestern Railroad.

And the same is signed by the Court and ordered to be filed as a part of the record in this cause.

This December 7th., 1915.

J. W. ROSS,
Chancellor.

231 *Decree Dismissing Bill as to R. M. Hall and Jackson Construction Company.*

Entered in M. B. 26, Page 373, June 19, 1916.

J. W. WRIGHT, JR.,

vs.

B. & N. W. RY. CO. et al.

Be it remembered that on this the 6th day of June, 1916, this cause came on to be and was heard before the Hon. J. W. Ross, Chancellor, upon the entire record in this cause including the procedendo from the Supreme Court of Tennessee, which is marked filed by the Clerk & Master May 8th, 1916, and copied upon Rule Minute Book No. 2, at pages 169, 170 and 171, and the Court being of the opinion from a consideration of the entire record in the cause that the complainant Susie E. Wright, administratrix of J. W. Wright, Jr., deceased, in whose name this suit was revived, is entitled to no relief against the defendants, Jackson Construction Company and R. M. Hall, it is accordingly so ordered, adjudged and decreed, and it is therefore by the Court ordered, adjudged and decreed the original, amended and supplemental bills filed by the complainant in this cause be and the same are hereby in all things dismissed as to the said defendants Jackson Construction Company and R. M. Hall and that said defendants Jackson Construction Company and R. M. Hall, have and recover of the complainant Susie E. Wright, Administratrix of J. W. Wright, Jr., and Fidelity & Deposit Company of Maryland, C. E. Pigford and R. E. L. Cope, sureties on complainant's prosecution bonds all the cost of this cause incident to said defend-

232 ants Jackson Construction Company and R. M. Hall, being sued as defendants in this cause and as may not have been heretofore adjudged and decreed by the Court by former interlocutory decrees and orders made in this cause, to all of which ruling and action of the Court in so decreeing that *that* complainant was entitled to no relief as against the defendants Jackson Construction Company and R. M. Hall and dismissing complainant's original, amended and supplemental bills as to said defendants and taxing complainant and said sureties on prosecution bonds with the costs of this cause as above decreed, the complainant Susie E. Wright, Administratrix of J. W. Wright, Jr., excepts.

All other matters not heretofore determined and adjudged by decree of the Court are by the Court reserved for future action and decree, and the complainant and defendants as to whom complainant's bill has not been dismissed heretofore are given until June 15th next within which to present such issues of fact as may by such parties be desired to be submitted to a jury.

This decree was made on June 6th, 1916, and is now ordered to be entered now for then.

233 *Order Dismissing Bill.*

Entered in Minute Book No. 26, Page 462, July 28th, 1916.

J. W. WRIGHT, JR.,

VS.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY et al.

Be it remember- that this cause came on to be heard by the Court and jury on this the 28th day of July 1916, upon the issues of fact made up by and under the direction of the Court, at a former day of this term, and which issues are three in number and are entered on the Minutes of the Court as of date June 21st, 1916, in Minute Book No. 26, at Page 381, to which reference is hereby made.

And thereupon, came the following jury all good and lawful men, to wit: Robert Evans, S. B. Enochs, W. W. Gates, Albert Johnson, Roy S. Rochelle, O. J. Stovall, J. R. Neely, J. F. Snider, B. L. Tyson, J. W. Branham, G. W. Jones, G. W. Wolf, who were duly elected, tried and sworn well and truly to try the said issues and a true verdict render thereon, according to the law and the evidence.

The pleadings consisting of the original bill, amended and supplemental bill of the complainant, and the answer of the Birmingham & Northwestern Railway Company were read to the jury.

The following issues formulated by the Court were read to the jury, to wit:

Issue No. 1.

234 Did the said J. W. Wright, Jr., do any work, not as a contractor in any way, in the building of said line of railway from Jackson, Tennessee, to Dyersburg, Tennessee, known as the Birmingham & Northwestern Railway, for which he is entitled to pay, if so, state the kind and amount and the amount which should be paid him therefor:

Issue No. 2.

Did the said J. W. Wright, Jr., furnish any materials, which were not furnished by him as a contractor, which went into or were used in the construction of said railway for which he should be paid, if so, state the kind and amount of such materials and the amount which should be paid therefor?

Issue No. 3.

State the fair, reasonable value of the benefits, if any, derived by said railway from any work done *of*, or materials furnished to or for said railway, not done or furnished by said Wright, as contractor.

Thereupon Counsel for complainant read to the Court and Jury the following statement, to wit:

J. W. WRIGHT, JR.,

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B. & N. W. RY. Co. et al.

The complainant, by solicitors states to the Court that, in view of the fact that the Court has dismissed the original and amended bills of the complainant to the Jackson Construction Company and R. M. Hall, and in view of the action of the Court in refusing to submit to the Jury any of the issues submitted on the former trial, and in view of the fact that the court has refused to submit to the jury any of the issues presented to the Court at the present term by
235 complainant, and in view of the fact that the Court has of its own motion formulated three issues which are alone ordered to be submitted to the jury as set out in said three issues, and in view of the action of the Court in declining to submit to the jury all proper and material issues of fact in the cause, arising under the pleadings, complainant will not offer any evidence to the jury upon the issues formulated by the Court for the reason that said issues do not submit proper and material issues of fact in this case.

BOND & BOND,
C. E. PIGFORD,
W. N. KEY,
Solicitors for Complainant.

Endorsed: "Filed July 28th, 1916. I. H. Nelson C. & M."

Thereupon counsel for the defendant, Birmingham & Northwestern Railway Company moved the Court peremptorily to instruct the jury to answer the issues in favor of the defendant, which motion was granted and the Court thereupon instructed the jury to make answer to the issues submitted as follows:

To issue No. 1: "The said J. W. Wright, Jr., did no work for which he is entitled to pay."

To issue No. 2: "The said J. W. Wright, Jr., did no work and furnished no materials for which he is entitled to pay."

To issue No. 3: "There were no benefits derived by said Railroad from any material or work done by the said J. W. Wright, Jr."

And thereupon the verdict of the jury on the several issues of fact was returned as directed by the Court.

And thereupon the cause coming on to be further and finally heard this day upon the pleadings and the entire record in the cause including the said findings of the jury, on consideration thereof,
236 it is ordered, adjudged and decreed by the Court that the complainant's original, amended and supplemental bills, as to the defendant, Birmingham & Northwestern Railway Company, be and the same are hereby dismissed and that the complainant, Mrs.

Susie E. Wright, Administratrix, of J. W. Wright, Jr., deceased, and C. E. Pigford and Fidelity & Deposit Company of Maryland and R. E. L. Cope, sureties on cost bonds, pay all the costs of the cause for which let execution issue.

237 *Decree on Motion for New Trial and Appeal.*

Entered in Minute Book No. 26, Page 482, August 12th, 1916.

J. W. WRIGHT, JR.,

vs.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY et al.

Be it remembered that this cause was this day further heard upon the motion of the complainant for a new trial, which motion is in the words and figures following, to wit:

J. W. WRIGHT, JR.,

vs.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY et al.

Motion of Complainant for a New Trial.

Comes the complainant and moves for a new trial on account of the verdict and decree rendered on the 28th day of July, 1916, for the following reasons:

First.

Error in the Court in dismissing the original and amended and supplemental bills of complain*ant* as to the Jackson Construction Company and R. M. Hall, and in dismissing said bills as to the Birmingham & Northwestern Railway Company.

And in dismissing said bills in so far as relief was sought by and under the original and supplemental contracts of J. W. Wright Jr. with the Jackson Construction Company.

Second.

238 Error in the Court in dismissing the original, amended and supplemental bills as to the defendants, Jackson Construction Company and R. M. Hall.

Third.

Error in the Court overruling the complainant's exceptions filed August 13th, 1915, to the finding of the jury.

Fourth.

Error in the decree of the Court of November 8th 1915, in sustaining certain exceptions of the Birmingham & Northwestern Railway Company and the Jackson Construction Company and R. M. Hall to the finding of the jury and in granting said defendants a new trial therein.

Fifth.

Error in the Court in refusing to submit to the jury issues of fact filed by complainant on July 14th 1915, or any of the issues submitted by the Court to jury on the former trial of the case.

And in refusing to submit to the jury any or all of the issues submitted and presented by complainant to the Court and filed July 15th 1916.

And in submitting to the jury the three issues submitted by the Court of its own motion on the 28th day of July, 1916.

Sixth.

Error in the Court of its own motion and over the objection of complainant submitting the three issues to the jury and ordering a trial on said three issues alone on the 28th day of July, 1916.

239 Seventh.

Error in the Court by said three issues in restricting complainant's recovery as set out and under said three issues.

Eighth.

The verdict of the jury is not responsive to the issues presented and submitted by the Court on the 28th day of July 1916.

Ninth.

Error in the Court in refusing to submit all material issues of fact arising on the pleadings to one jury.

BOND & BOND,
C. E. PIGFORD,
W. N. KEY,
Solicitors for Complainant.

Endorsed: "Filed August 5th, 1916. I. H. Nelson, C. & M."

And the Court being of the opinion that said motion is not well taken, the same is overruled and disallowed.

To the action of the Court in dismissing the bill and amended and supplemental bills as to the several defendants and in refusing to sub-

mit proper issues of fact to the jury, the complainant prays an appeal to the next term of the Supreme Court, and especially does the complainant appeal from the actions and decrees of the Court in sustaining the demurrers in whole and in part and in dismissing complainant's bill and amended and supplemental bills as shown in the decree of the Court entered in the cause on March 22nd, 1913, in Minute Book 24, at page 573, and in disallowing amendments as shown by decree entered on August 31, 1912, entered in Minute Book 24, page 408, and in overruling complainant's exceptions to the findings of the jury and in sustaining the motions of the defendants for a new trial, and in setting aside the verdict and finding of the jury as
240 shown in the decree of the Court of August 13th 1915, entered in Minute Book 26, at page 89, and in dismissing the original, amended and supplemental bills of complainant as to Jackson Construction Company and R. M. Hall, and as to the Birmingham & Northwestern Railway Company seeking recovery under said contracts with the Jackson Construction Company on November 8th, 1915, entered in Minute Book 26 at page 92, and the decree of June 7th, 1916, entered in Minute Book 26, page 373, and refusing to submit to the jury the issues tendered to the Court as shown by the decree of June 21st, 1916, and in formulating and submitting the issues therein prepared by the Court, and in declining to submit all issues of fact to one jury as shown in said above decree and in the decree of the Court of July 24th 1916, and in overruling motion for a new trial, which said prayer for appeal is by the Court granted upon condition that the complainant execute and file appeal bond as required by law and upon application of complainant and satisfactory reasons therefor appearing to the Court, Complainant is allowed thirty days from this date within which to file said appeal bond and to prepare and file a bill of exceptions, if such is deemed necessary.

241 In the Supreme Court of Tennessee, Western Division, at Jackson, April Term, 1917.

J. W. WRIGHT, JR.,

VS.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY et al.

Motion of A. P. Chalker to Revive Cause in His Name as Administrator of the Estate of J. W. Wright, Jr., Deceased.

Comes A. P. Chalker by his solicitors and suggests to the Court that, during the pendency of the appeal in this cause, Mrs. Susie E. Wright, Administratrix of the estate of J. W. Wright Jr., deceased, has resigned as administratrix of said estate and that he, the said A. P. Chalker, has been duly appointed and qualified as administrator of said estate in the place of the said Mrs. Susie E. Wright, by the County Court of Madison County Tennessee, and moved the Court that this cause be revived in his name as administrator of the estate of J. W. Wright, Jr., deceased and that the cause stand in the same

plight and condition as it was at the time of the resignation of the said Mrs. Susie E. Wright.

This motion is based upon the original letters of administration granted to said A. P. Chalker by said County Court of Madison County, which letters are hereto attached.

A. P. CHALKER,
Administrator, &c.,
By BOND & BOND,
C. E. PIGFORD,
W. N. KEY,
Solicitors.

242 THE STATE OF TENNESSEE:

Pleas Before the Supreme Court of Said State, for the Western Division Thereof, at the April Term, A. D. 1917.

Present: The Hon. M. M. Neil, Chief Justice and D. L. Landen, Grafton Green, A. S. Buchanan and Samuel C. Williams, Associate Judges.

When the following proceedings were had, to wit: May 18th, 1917.

243 No. 16. Madison Chancery Docket.

J. W. WRIGHT, JR.,

vs.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY et al.

Order Reviving Cause in the Name of A. P. Chalker, Administrator of the Estate of J. W. Wright, Jr.

The resignation of Mrs. Susie E. Wright was this day duly suggested in open Court; and thereupon came A. P. Chalker and filed his letters of administration on the estate of said J. W. Wright, Jr., deceased, and moved the Court to revive this cause in his name as such Administrator, on consideration whereof said motion was allowed, and said cause revived in the name of said A. P. Chalker as such administrator, and ordered to stand in the same plight and condition as it was at the time of the resignation of the said Mrs. Susie E. Wright, Administratrix.

244 THE STATE OF TENNESSEE:

Pleas Before the Supreme Court of said State, for the Western Division Thereof, at the April Term, A. D. 1917.

Present: The Hon. M. M. Neil, Chief Justice, and D. L. Lansden, Grafton Green, A. S. Buchanan, and Samuel C. Williams, Associate Judges, when the following proceedings were had, to wit: June 20th, 1917:

245 No. 16. Madison Chancery.

J. W. WRIGHT, JR.,

VS.

JACKSON CONSTRUCTION CO. et al.

Be it remembered that this cause came on this day to be heard upon the transcript of the record, of the Court below, assignments of error, briefs, and reply briefs, Whereupon it is ordered, adjudged and decreed by the Court that the decree of the Chancellor dismissing complainant's bill, be, and the same is affirmed, and the said bill is hereby dismissed for the reasons, and on the grounds set forth in the opinion of the Court this day filed in this cause, which opinion is hereby made a part of this decree, as fully as if set forth herein, in hæc verba, and in event this case shall hereafter be transferred to the Supreme Court of the United States, on petition for writ of error, or otherwise, the Clerk of this Court shall include a copy of said opinion as a part of the transcript of the record and of this decree.

It is further ordered, adjudged, and decreed that the decree of the Chancery Court, adjudging costs accrued in that Court, will be enforced, as therein ordered and decreed, and execution is awarded from this Court to enforce the collection thereof, it is further ordered, adjudged and decreed, that the defendants have and recover of Amos P. Chalker, admr. of J. W. Wright, Jr., deceased, in whose name this cause has been heretofore revived in this Court, and of C. E. Pigford, surety on the appeal Bond, all of the costs of the appeal to this Court, for all of which let execution issue.

246 As to R. M. Hall, the bill is dismissed on the ground that he was only liable, as surety on the contract, and the jury having found in response to issue, No. 2., that nothing was due on the contract, there could in no event be a recovery against the said Hall.

247 Jackson, April Term, 1917.

J. W. WRIGHT, JR.,

VS.

JACKSON CONSTRUCTION CO. et al.

Opinion.

Defendants contend that the finding on issue No. 2 settles the whole controversy against the complainant. Standing alone, or considered apart from other matters, it necessarily does, because in response to that issue the jury found there was nothing due the complainant on the contract on which he sued. But there were other issues, with the responses of the jury thereto, some of which

were set aside by the chancellor, on motion for new trial by the parties. Among these was issue no. 4 which presented the inquiry whether there was anything due the complainant on a quantum meruit for services performed or materials furnished, he having alleged such a ground of action in his original bill, in the alternative, in case he could not succeed in his action on the contract. In response to this issue the jury found the defendant Jackson Construction Company indebted to the complainant in the sum of $9,403.80, and nothing further appearing, complainant is entitled to a judgment for this sum; and the jury having further found that due notice was given, he would apparently be entitled to a lien on the line of railroad; but the question of the lien is not decided authoritatively, such decision being at this time unnecessary, as will presently appear.

It is rightly objected, as we think, that, under section 6282 of Shan. Code, (Thomp. Ed.,), all of the issues must be tried
248 in chancery by the same jury. Now in this case the chancellor permitted certain issues with the responses thereto by the jury, among other issues, no. 2 to stand overruling the motion for new trial as to them, but he sustained the motion and awarded a new trial as to certain other issues. Ought we to hold that the order granting a new trial as to some of the issues while refusing it as to others, resulted in granting a new trial, automatically, as to all, or that the granting of a new trial as to any of them without granting it as to all was simply void. In our judgment the latter is the correct view. One such action being taken by the chancellor the respective parties should have prepared and filed a *fill* of exceptions for use on appeal after the final trial at which the chancellor would again attempt to hear the case on the matters as to which he granted a new trial. But it seems this was not done because of the very great expense that would have been thereby incurred.

It seems from the record that the chancellor did enter upon another trial, first framing therefor three issues which he thought covered the matter embraced in No. 4, in respect of the quantum meruit; that he caused a jury to be empaneled, that the complainant refused to introduce any evidence on these issues because the chancellor would not submit all of the issues which the complainant offered on the first or original trial of the case, and that the chancellor thereupon directed the jury to return a verdict for the defendants, which was accordingly done, and that he entered a decree, final, dismissing the bill. An appeal was then prosecuted to this court. The vital mistake was committed when the chancellor awarded a new trial on only a part of the issues.

Further on this point: The law is that only determinative issues can be presented, that is, determinative of the whole case or of some distinct or separable part or branch of the case. Crisman v. McMurray, 107 Tenn. 469; Connor vs. Frierson, 98 Tenn.,
249 183; McElya v. Hill, 105 Tenn., 416. The case of Madison Trust Co. vs. Stahlman, 134 Tenn., 402, as to what it says upon the subject of proper jury issues in chancery is confined to its facts. All other determinative issues are immaterial,

and a new trial in respect thereof could not be lawfully ordered, and if ordered would be of no legal import. Naught added to naught is still but naught. So, if there be one determinative issue in the case, the submission of others is immaterial; all that can be looked to is the verdict of the jury on the material issue. Continental Nat. Bank vs. First Nat. Bank, 108 Tenn. 374-376. That will be decisive of the case, no matter how many immaterial issues are submitted to or decided by the jury. They should be treated as not submitted at all. Gass vs. Mason, 4 Sneed, 509; Minton vs. Wilkerson, 133 Tenn., 484-487.

The rule that if there be a new trial granted by the chancellor as to one of the material determinative issues he must grant it as to the others, or as to all, will no doubt produce inconvenience, in some instances, but it is, as we think, a necessary deduction from the statutory provision that "all the issues of fact in any case shall be submitted to one jury"—Shan. Code, sec. 6282, supra. It is apparent, too, that in the absence of such a provision jury trials in chancery might be practically interminable. It may be that this court, in the exercise of its appellate jurisdiction, when we can clearly see that a due administration of justice requires it, as was done in a recent law case, (Perkins vs. Brown, 132 Tenn., 294), can approve the verdict on one issue, and so remove it from the field of controversy, and remand for a new trial on the other, or others, in a chancery cause; but such a case is not before us, at this time, and we do not now decide it.

250 The question remains whether the complainant is entitled to judgment on the amount found for him under issue No. 4—$9,403.80. The solution of this question depends on the construction of sec. 4 of Chap. 479 Acts of 1909. That section, so far as necessary to quote here, reads:

"Section 4. Be it further enacted, that each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation, on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county court clerk as provided by law for the collection of revenue.

* * * * * * * *

"Each foreign construction company, with its chief office outside of this state, operating or doing business in this state, directly or by agent, or by any subletting contract, each, per annum in each county $100.00

"Each domestic construction company and each foreign construction company, having its chief office in this state, doing business in this state, each, per annum, in each county 25.00

"The above tax shall be paid by persons, firms, or corporations engaged in the business of constructing bridges, water-works, railroads, street-paving constructon work, or other work, or structure of a public nature."

Section 16 of the same Act reads:

"Be it further enacted, that it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all parties so offending shall be liable to a fine of not less than $10.00 nor more than $50.00 for each day such privilege is exercised without license, but *but* this inhibition shall not apply to any person,
251 firm, or corporation engaged in interstate commerce."

Complainant insists that section 4 discriminates between citizens of Tennessee and those of other states requiring the latter to pay a tax of one hundred dollars for the privilege of doing railroad construction business here, while citizens of this State are required to pay only twenty-five dollars, hence that the section is in conflict with Art. IV., sec. 2, subsec. 1, of the Federal Constitution, and also with the fourteenth amendment to the same instrument. In our judgment the construction suggested is not a sound one. The determining feature in the legislation quoted is the having of one's chief office in this State. Any citizen of this State, as well as any citizen of a foreign state, who has his chief office out of the State, must pay the one hundred dollars tax; so *if* any domestic corporation, as well as foreign corporation, having its chief office out of the State. Any foreign corporation or citizen of another State, or firm, as well as domestic corporations, citizens of the state, and firms of this state having its or their cheif office in this State, are all alike entitled to carry on a railroad construction business here on the payment of twenty-five dollars. There is no discrimination at all.

It is not denied that complainant failed to pay the tax before he did the work. After the work was performed and before suit — brought he paid the twenty-five dollar tax. This was too late, even if he had paid the one hundred dollars, the tax applicable to his situation, he being a citizen of Alabama with his chief office there. It was too late because payment of a privilege tax and procurement of a license after the privilege has been exercised,
251½ though before suit — brought, will not give the party so paying any right to maintain suit. Saule vs. Ryan, 53 S. W., (Tenn.), 977. The complanant having acted in violation of a statute in undertaking and transacting the business can not recover. Stevenson v. Ewing, 3 Pick., (87 Tenn.), 46; Pile vs. Carpenter, 118 Tenn., 288.

The result is the decree of the chancellor dismissing the bill must be affirmed with costs.

NEIL, *C. J.*

252 *Petitioner for Writ of Error to the Supreme Court of Tennessee.*

In the Supreme Court of the United States, October Term, A. D. 191–.

In Equity.

J. W. WRIGHT, JR.,

vs.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY, JACKSON CONSTRUCTION COMPANY et al.

To the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, and the Associate Justices of said Court:

Now come, A. P. Chalker, Administrator de bonis non of the estate of J. W. Wright, Jr., deceased, and C. E. Pigford, plaintiffs in error in the above cause, and would show unto this Honorable Court that in the record and proceedings, and rendition of the decree in the above cause by the Supreme Court of the State of Tennessee, it being the highest Court of said State in which a decision could be had on the said suit between A. P. Chalker, Administrator de bonis non of the estate of J. W. Wright, Jr., deceased, and C. E. Pigford, compiainants, and the Birmingham & Northwestern Railway Company, the Jackson Construction Company, the Union Bank & Trust Company, and R. M. Hall, defendants, the first three named defendants being corporations under the laws of the State of Tennessee, manifest error has occurred greatly to their damage, whereby petitioners feel aggrieved.

That in the record and proceedings it will appear that
253 there was drawn in question the validity of a statute of the State of Tennessee on the ground of repugnancy to Article IV., Section 3, of the Constitution of the United States and the Equal Protection Clause of the XIV. Amendment of the Constitution of the United States, and the decision in favor of the validity of the law of the State; all of which is fully apparent in the record and proceedings of the case, and specifically set forth in the assignments of errors filed herewith.

Wherefore petitioners pray that their appeal be allowed and that a transcript of the record, proceedings and papers upon which said orders were made, duly authenticated, be ordered sent to the Supreme Court of the United States, at Washington D. C., under the rules of said Court in such cases made and provided, that the same may be inspected and corrected as according to law and justice should be done.

BOND & BOND,
C. E. PIGFORD,
W. N. KEY,
Solicitors for Petitioners.

254 *Order Allowing Petition for Writ of Error to the Supreme Court of Tennessee.*

In the Supreme Court of the United States, October Term, A. D. 191–.

In Equity.

J. W. WRIGHT, JR.,

vs.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY, JACKSON CONSTRUCTION COMPANY et al.

On this the 25th day of August, A. D. 1917, came on to be heard the application of A. P. Chalker, Administrator de bonis non of the estate of J. W. Wright, Jr., deceased, and C. E. Pigford, the plaintiffs in error, said plaintiffs in error being represented by counsel, for writ of error, and it appearing to the Court from the petition filed herein, and the record filed therewith, that the application ought to be granted and that a transcript of the record and proceedings and papers upon which the judgment of the Court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in the petition, that such proceedings may be had as will be just in the premises.

It is therefore ordered that the writ of error be allowed upon the plaintiffs giving bond, conditioned as the law directs, in the sum of Twelve Hundred and Fifty Dollars, which may operate as a supersedeas, and that a true copy of the record, assignments of errors and all proceedings had in the case in the Supreme Court of Ten-
255 nessee shall be transmitted to the Supreme Court of the United States, properly certified as the law directs, that the said Court may inspect the same and do what according to law should be done.

M. M. NEIL,
Chief Justice of Supreme Court of Tennessee.

256 *Bond.*

Know all men by these presents, that we, A. P. Chalker, Administrator de bonis non of the estate of J. W. Wright, Jr., deceased, and C. E. Pigford, as principals, and T. B. Carroll and W. N. Key, sureties, are held and firmly bound unto the Birmingham & Northwestern Railway Company, the Jackson Construction Company, the Union Bank and Trust Company and R. M. Hall in the full and just sum of Twelve Hundred and Fifty Dollars ($1250.00) to be paid to the said Birmingham & Northwestern Railway Company, Jackson Construction Company, Union Bank and Trust Company, and R. M. Hall, their certain attorney, executors, administrators, assigns, successors, or transferees: to which payment, well and truly to be made, we bind ourselves, our heirs executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the 24th day of August, A. D. 1917.

Whereas, lately at the April Term, A. D. 1917, to wit: on June 20th, 1917, of the Supreme Court of Tennessee for the Western Division thereof at Jackson in a suit depending in said Court between the said A. P. Chalker, Administrator de bonis non of the estate of J. W. Wright, Jr., deceased, and C. E. Pigford, complainants, and The Birmingham & Northwestern Railway Company, the Jackson Construction Company, The Union Bank & Trust Company, and R. M. Hall, and a decree was rendered against said A. P. Chalker, Administrator, de bonis non of the estate of J. W. Wright, Jr., deceased, and C. E. Pigford, and the said A. P. Chalker, Administrator de bonis non of the estate of J. W. Wright, Jr., deceased and C. E. Pigford having obtained a writ of error and filed a copy thereof in the Clerk's Office to reverse the decree in the aforesaid suit, and a citation directed to the said Birmingham & Northwestern Railway Company, Jackson Construction Company, Union Bank & Trust Company and R. M. Hall, citing and admonishing them to be
256½ and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said A. P. Chalker, Administrator do bonis non of the estate of J. W. Wright, Jr., deceased, and C. E. Pigford, shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

A. P. CHALKER. [L. S.]
C. E. PIGFORD. [L. S.]
T. B. CARROLL. [L. S.]
W. N. KEY. [L. S.]

Approved by
M. M. NEIL,
Chief Justice of the Supreme Court of Tennessee.

257 Filed Aug. 28, 1917. T. B. Carroll, Clerk, by ——, D. C.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable The Judges of the Supreme Court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court of Tennessee for the Western Division thereof at Jackson, at the April Term A. D. 1917, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between A. P. Chalker, Administrator de bonis non of the estate of J. W. Wright, Jr., deceased, and C. E. Pigford, complainants, and the Birmingham & Northwestern Railway Company, a corporation, the Jackson Construction Company, a corporation, the Union Bank

& Trust Company, a corporation, and R. M. Hall, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said A. P. Chalker, Adminisrator de bonis non of the estate of J. W. Wright, Jr., deceased, and C. E. Pigford, as by their complaint appears.
257½ We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 27th day of August, in the year of our Lord One Thousand Nine Hundred and Seventeen.

[Seal of the District Court of the United States, Western Judicial District of Tennessee.]

A. G. MATHEWS,
Clerk of the United States District Court of the Western District of Tennessee,
By E. J. HEIDEL,
Chief Deputy Clerk.

Allowed by
M. M. NEIL,
Chief Justice of the Supreme Court of Tennessee.

[Endorsed:] J. W. Wright, Jr., — Birmingham & Northwestern Railway Co. et al. Writ of Error. Filed Aug. 28, 1917. T. B. Carroll, Clerk, by ——, D. C. C. E. Pigford, Lawyer, Jackson, Tennessee.

258 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable The Judges of the Supreme Court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court of Tennessee for the Western Division thereof at Jackson, at the April Term A. D. 1917, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between A. P. Chalker, Administrator de bonis non of the estate of J. W. Wright, Jr., deceased, and C. E. Pigford, complainants, and the Birmingham & Northwestern Railway Company, a corporation, the Jackson Construction Company, a corporation, the Union Bank & Trust Company, a corporation, and R. M. Hall, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any treaty *of* statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said A. P. Chalker, Administrator de bonis non of the estate of J. W. Wright, Jr., deceased, and C. E. Pigford, as *their* their complaint appears. We being will-
259 ing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 27th day of August, in the year of our Lord One Thousand Nine Hundred and Seventeen.

[SEAL.] A. G. MATHEWS,
Clerk of the United States District Court of the Western District of Tennessee,
By E. HEIDEL,
Chief Deputy Clerk.

Allowed by
M. M. NEIL,
Chief Justice of the Supreme Court of Tennessee.

260 Filed Aug. 29, 1917. T. B. Carroll, Clerk, by —— ——, D.C.

UNITED STATES OF AMERICA, *ss:*

To The Birmingham & Northwestern Railway Company, a corporation; The Jackson Construction Company, a corporation; The Union Bank & Trust Company, a corporation; R. M. Hall, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Tennessee for the Western Division thereof, wherein A. P. Chalker, Administrator de bonis non of the estate of J. W. Wright, Jr., deceased, and C. E. Pigford, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable M. M. Neil, Chief Justice of the Supreme Court of Tennessee, this the 25th day of August, in the Year of our Lord One Thousand Nine Hundred and Seventeen.

M. M. NEIL,
Chief Justice of the Supreme Court of Tennessee.

261 On this the 29th day of August, in the year of our Lord one thousand nine hundred and seventeen (1917), personally appeared W. N. Key before me the undersigned authority, J. E. Springbett, Deputy Clerk of the Supreme Court of Tennessee for the Western Division thereof, and makes oath that he is one of the solicitors for the plaintiffs in error and that as such solicitor he delivered a true copy of the within and attached citation to W. H. Biggs and R. F. Spragins, solicitors for the Birmingham & Northwestern Railway Company, a corporation, and the Union Bank & Trust Company, a corporation, to W. G. Timberlake, solicitor for the

Jackson Construction Company, a corporation; and to R. R. Sneed, solicitor for R. M. Hall, defendants in error, and that the delivery of the respective copies to the respective solicitors above mentioned were all made on the 28th day of August, 1917.

W. N. KEY.

Sworn to and subscribed before me, this the 29th day of August, A. D. 1917.

[Seal Supreme Court of Tennessee, Western Division, Jackson.]

J. E. SPRINGBETT,
Deputy Clerk of the Supreme Court of Tennessee.

262 [Endorsed:] J. W. Wright, Jr., — Birmingham & Northwestern Railway Co. et al. Citation and Proof of Service. C. E. Pigford, Lawyer, Jackson, Tennessee.

263 UNITED STATES OF AMERICA, *ss:*

To The Birmingham & Northwestern Railway Company, a corporation; The Jackson Construction Company, a corporation; The Union Bank & Trust Company, a corporation; R. M. Hall, Greetings:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Tennessee for the Western Division thereof, wherein A. P. Chalker, Administrator de bonis non of the estate of J. W. Wright, Jr., deceased, and C. E. Pigford, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable M. M. Neil, Chief Justice of the Supreme Court of Tennessee, this the 25th day of August, in the Year of our Lord One Thousand Nine Hundred and Seventeen.

M. M. NEIL,
Chief Justice of the Supreme Court of Tennessee.

264 The Supreme Court of the United States.

J. W. WRIGHT, JR.,

VS.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY et al.

Assignments of Error.

And now, on this the — day of August, A. D. 1917, came the plaintiffs in error, A. P. Chalker, administrator de bonis non of the

estate of J. W. Wright, Jr., deceased, and C. E. Pigford, by their solicitors, Bond & Bond, C. E. Pigford and W. N. Key, and say that the decree entered in the above cause by the Supreme Court of the State of Tennessee for the Western Division thereof at Jackson, on the 20th day of June, A. D. 1917, is erroneous and unjust to the plaintiff in error in this to wit:

First.

The Supreme Court of Tennessee erred in dismissing the Original, Amended and Supplemental Bills of the complainant, J. W. Wright, Jr., in said cause, and in declining and refusing to render a decree in said cause in favor of A. P. Chalker, Administrator de bonis non of the estate of J. W. Wright, jr., deceased, in whose name said cause had been revived, for the sum of Nine Thousand Four Hundred and Three Dollars and eighty cents and interest, and in denying complainant any relief in said cause, and in taxing the said A. P. Chalker, Administrator aforesaid, and C. E. Pigford, his surety, with the costs of the cause, and in adjudging and decreeing
265 that the said J. W. Wright, Jr., was liable for the *the* payment of a privilege tax for engaging in and carrying on a construction business in Tennessee, under the provisions of the Revenue Act of Tennessee of 1909 as shown in the first paragraph of the Revenue Act of 1909, Chapter 479, Section 4, at pages 1726 and 1735 of the Acts of the General Assembly of Tennessee for 1909, which is as follows, viz:

"Section 4. Be it further enacted, that each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the County Court Clerk as provided by law for the collection of revenue.

* * * * * * *

Construction Companies.

Each foreign construction company, with its chief office outside of this state, operating or doing business in this state, directly or by agent, or by any subletting contract, each per annum, in each county $100.00

Each domestic construction company and each foreign construction company, having its chief office in this state, doing business in this state, each, per annum, in each county.... $25.00

The above tax shall be paid by persons, *forms* or corporations engaged in the business of constructing bridges, waterworks, railroads, street paving construction work, or other work, or structure of a public nature.

* * * * * * *

Section 16. Be it further enacted, that it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first

paying the taxes prescribed for the exercise of the same, and all parties so offending shall be liable to a fine of not less than $10.00 nor more than $50.00 for each day such privilege is exercised without license, but this inhibition shall not apply to any person, firm, or corporation engaged in interstate commerce."

Because said above provisions of the Revenue Act of 1909 fixing a privilege tax against persons, firms and corporations for engaging in and carrying on a construction business is unconstitutional and void in that there is a discrimination against non-residents of Tennessee in that a tax of $100.00 is levied against non resident
266 persons, firms and corporations, not having their chief office in Tennessee, while a tax of only $25.00 is levied against residents, of Tennessee, and persons, firms and corporations having their *cheif* office in Tennessee, and thereby abridges the privileges and immunities of citizens of the United States not residents of Tennessee, and denies to citizens of the United States not citizens of Tennessee the equal protection of the law.

The pleadings show, the proof establishes and the Supreme Court of Tennessee found, that at the time of the making of the contracts sued upon in this cause and at the time the work was done under the contracts and for which compensation was sought by J. W. Wright, Jr., in his Original Amended and Supplemental bills in this cause that the said J. W. Wright, Jr., was a resident and citizen of the State of Alabama, having his *cheif* office and principal place of business at Union Springs in the State of Alabama.

The constitutional provisions violated by said section of said Act are as follows:

Constitution of the United States, Article IV, Section 2:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The Equal Protection *Cal*use of the Fourteenth Amendment of the Constitution of the United States:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction *of* the equal protection of the laws."

Second.

The Supreme Court of Tennessee erred in affirming the decree of the Chancery Court of Madison County, Tennessee, which Court decreed as follows:

267 "That the said J. W. Wright, Jr., at the time of the making and execution of the contracts with the Jackson Construction Company, sued upon in this cause, had not paid the privilege tax required to be paid by him by law, and that for that reason his administratrix in whose name this suit has been revived is not entitled to maintain said actions, in so far as any relief is sought by virtue of said contracts."

1. Because the first paragraph of that part of the Revenue Act of 1909, Chapter 479, Section 4, page 1726, and 1735, viz.:

"Each foreign construction company, with its chief office outside of this state, operating or doing business in this state, directly or by agent, or by any subletting contract, each per annum, in each county, $100.00."

Is unconstitutional and void in that it discriminates against non-residents of Tennessee and in favor of residents of Tennessee, by imposing a tax of $100.00 against non-resident persons, firms and corporations doing a construction business in Tennessee, while by the next section of said Act a tax of only $25.00 is imposed upon resident persons, firms and corporations doing a construction business in Tennessee, thereby violating the provisions of Article IV., Section 2, of the Constitution of the United States, and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

2. Because the said Act of 1909, Chapter 479, is not applicable to the said J. W. Wright, Jr., and he is not liable for any tax after the said unconstitutional section has been eliminated, he not being a resident or citizen of Tennessee, and not having his chief office in Tennessee, as provided in said Act.

Third.

The Court erred in affirming the decree of the Chancery Court, wherein said Chancery Court decreed as follows:

268 "That the complainant, Susie E. Wright, Administratrix of J. W. Wright, Jr., deceased, in whose name this suit was revived, is entitled to no relief against the defendants, Jackson Construction Company and R. M. Hall, and it is accordingly so ordered, adjudged and decreed, and it is therefor- by the Court ordered, adjudged and decreed that the original, amended and supplemental bills filed by the complainant in this cause be and the same are hereby dismissed in all things as to the said defendants, Jackson Construction Company and R. M. Hall."

Because of the several reasons set forth under the first and second assignments of error.

Wherefore the said A. P. Chalker, Administrator de bonis non of the estate of J. W. Wright, Jr. deceased, and C. E. Pigford pray that said decree of the Supreme Court of Tennessee be reversed and that said Supreme Court of Tennessee be instructed to enter such decree as may be proper on the record in said Court.

BOND & BOND,
C. E. PIGFORD,
W. N. KEY,
Solicitors for Plaintiffs in Error.

269 *Præcipe.*

In the Supreme Court of Tennessee.

J. W. WRIGHT, JR.,

vs.

BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY, JACKSON CONSTRUCTION COMPANY et al.

Pursuant to the provisions of Rule Eight, Section 1 of the Supreme Court of the United States promulgated December 22, 1911, we hereby designate for the plaintiff in error the following portions of the record to be incorporated in the transcript to be filed in the Supreme Court of the United States on return to writ of error heretofore sued out and issued in this cause, to wit:

1. Plaintiff in Error's petition for writ of error.
2. Order allowing petition for writ of error.
3. Writ of error bond.
4. Writ of error (Original writ to be transmitted to the Clerk of the Supreme Court of the United States.)
5. Citation together with proof of service.
6. Assignment of Errors filed with petition for writ of error.
7. Original bill, Record, pp. 3 to 19.
8. Exhibits to Original Bill, Record, pp. 20 to 48.
9. Amended and Supplemental Bill, Record pp. 51 to 62.
10. Second Amended and Supplemental Bill, Record, pp. 71 to 80.
11. Order allowing amendments, Record, p. 82.
12. Amendment to Bill, Record pp. 161 to 162.
13. Amendment to Bill, Record pp. 163 to 172.
14. Order allowing amendments, Record p. 173.
15. Order of Revivor, Record p. 175.

270 16. Answer and Cross-bill of Jackson Construction Company, Record pp. 186 to 227.

17. Answer of Birmingham & Northwestern Railway Company, Record pp. 230 to 253.
18. Answer of Union Bank & Trust Company, record pp. 254 to 255.
19. Answer of R. M. Hall, Record pp. 255 to 266.
20. Answer of Mrs. Wright to Cross-bill, Record pp. 271 to 272.
21. Entry of Findings of Jury on Issues, Record pp. 306 to 310.
22. Order allowing amendment as to Exhibit, Record p. 299.
23. Exhibit A to Original Bill, Record pp. 329 to 373.
24. Decree on Motions and Exceptions, Record pp. 374 to 377.
25. Decree of Court dismissing Original and Supplemental Bills, and Cross-bill as to recovery on contract, Record pp. 377 to 380.
26. Bill of Exceptions, Record pp. 382 to second page numbered 392.

27. Decree Dismissing Bill as to R. M. Hall and Jackson Construction Company, Record pp. 401 to 402.
28. Order Dismissing Bill, Record pp. 411 to 413.
29. Decree on Motion for New Trial, Record pp. 416 to 419.
30. Motion of A. P. Chalker to Revive cause in his name as administrator of the estate of J. W. Wright Jr., deceased, and letters of administration attached, filed in Supreme Court of Tennessee on May 18th, 1917.
31. Order based on said motion reviving cause, recorded in Minute book No. 52 at page —.
32. Decree of Supreme Court of Tennessee, affirming the decree of Chancery Court of Madison County, Minute Book No. 52 at page —.
33. Opinion of the Supreme Court of Tennessee, rendered by Chief Justice M. M. Neil and filed June 20th, 1917.

This September 7th, 1917.

BOND & BOND,
C. E. PIGFORD,
W. N. KEY,
Solicitors for Plaintiff in Error.

271 On this the 8th day of September, in the year of our Lord one thousand nine hundred and seventeen (1917) personally appeared W. N. Key before me the undersigned authority, J. E. Springbett, Deputy Clerk of the Supreme Court of Tennessee for the Western Division thereof, and makes oath that he is one of the solicitors for the plaintiffs in error and that as such solicitor he delivered a true copy of the within and attached præcipe to W. H. Biggs and R. F. Spragins, solicitors for the Birmingham & Northwestern Railway Company, a corporation, and the Union Bank & Trust Company, a corporation, and to W. H. Timberlake, solicitor for the Jackson Construction Company, a corporation, on September 7th, 1917, and that he delivered a true copy thereof to R. R. Sneed, solicitor for R. M. Hall, on September 8th, 1917.

W. N. KEY.

Sworn to and subscribed before me, this the 8th day of September, 1917.

J. E. SPRINGBETT,
Deputy Clerk of the Supreme Court of Tennessee.

272 *Certificate.*

I, T. B. Carroll, Clerk of the Supreme Court of Tennessee for the Western Division thereof at Jackson, do hereby certify that the above and foregoing is a true, full, correct and complete transcript of the parts of the record, assignment of errors and all proceedings had in cause No. 16 Madison Chancery Docket, at the April term 1917, of the Supreme Court of Tennessee, wherein A. P. Chalker,

Admr., of the estate of J. W. Wright, Jr., deceased, is complainant and Birmingham and North Western Ry. Company, Jackson Construction Company, R. M. Hall and Union Bank & Trust Company are defendants, designated by the solicitors for the plaintiff in error, A. P. Chalker, Admr., to be incorporated in this transcript, the parts of said record and proceedings so designated by said plaintiff in error by his solicitors of record, being as follows:

273 1. Plaintiff in Error's petition for writ of error.

2. Order allowing petition for writ of error.

3. Writ of error bond.

4. Writ of error. (Original writ to be transmitted to the Clerk of the Supreme Court of the United States.)

5. Citation together with proof of service.

6. Assignment of Errors filed with petition for writ of error.

7. Original Bill, Record pp. 3 to 19.

8. Exhibits to Original Bill, Record pp. 20 to 48.

9. Amended and Supplemental Bill, Record pp. 51 to 62.

10. Second Amended and Supplemental Bill, Record pp. 71 *tl* 80.

11. Order allowing amendments, Record p. 82.

12. Amendment to Bill, Record pp. 161 to 162.

13. Amendment to Bill, Record, pp. 163 to 172.

14. Order allowing amendments, Record p. 173.

15. Order of revivor, Record p. 175.

16. Answer and Cross-bill of Jackson Construction Company, Record pp. 186 to 227.

17. Answer of Birmingham & Northwestern Railway Company, Record, pp. 186 to 227.

18. Answer of Union Bank & Trust Company, Record pp. 254 to 255.

19. Answer of R. M. Hall, Record, pp. 255 to 266.

20. Answer of Mrs. Wright to Cross-Bill, Record pp. 271 to 272.

21. Entry of Findings of Jury on Issues, Record pp. 306 to 310.

22. Order allowing amendment as to Exhibit, Record p. 299.

23. Exhibit A to Original Bill, Record pp. 359 to 373.

25. Decree of Court Dismissing Original and Supplemental Bills, and Cross-bill as to recovery on contracts, Record, pp. 377 to 380.

274 26. Bill of Exceptions, Record pp. 382 to second page numbered 392.

27. Decree Dismissing bill as to R. M. Hall and Jackson Construction Company, Record pp. 401 to 402.

28. Order dismissing Bill, Record pp. 411 to 413.

29. Decree on Motion for New Trial, Record pp. 416 to 419.

30. Motion of A. P. Chalker to Revive cause in his name as administrator of the estate of J. W. Wright, Jr., deceased and letters of administration attached, filed in Supreme Court of Tennessee on May 18th, 1917.

31. Order based on said motion reviving cause, recorded in Minute Book No. 52, at page —.

32. Decree of Supreme Court of Tennessee, affirming the decree

of Chancery Court of Madison County, Minute Book No. 52, at page —.

33. Opinion of the Supreme Court of Tennessee, rendered by Chief Justice M. M. Neil and filed June 20th, 1917.

275 I further certify that the originals of the several parts of the record so designated and copied in to the transcript now remain on file in my office, except writ of error and citation.

I also further *further* certify that the above and foregoing transcript contains a full, true, correct and complete copy of the præcipe filed by the solicitors for the plaintiff in error wherein they designated the parts of the record and proceeding to be incorporated in this transcript together with proof of service of same on defendants, the original being on file in my office.

I further certify that no additional parts of said record and proceedings have been designated by either of the defendants or their solicitors to be copied into this transcript. I further certify that there *aer* attached to the above and foregoing transcript and transmitted herewith the original writ of error sued out and issued in this cause, and also the original citation together with proof of service of same upon the solicitors for the defendants.

Witness my hand officially and the seal of said Court, at office in Jackson, Tennessee, this 21st day of September, A. D. 1917.

[Seal Supreme Court of Tennessee, Western Division, Jackson.]

T. B. CARROLL,
Clerk of Supreme Court of Tennessee for the Western Division Thereof, at Jackson,
By J. E. SPRINGBETT, *D. C.*

Endorsed on cover: File No. 26176. Tennessee Supreme Court, Term No. 709. A. P. Chalker, Administrator de bonis non of the estate of J. W. Wright, Jr., deceased, and C. E. Pigford, plaintiffs in error, vs. The Birmingham & Northwestern Railway Company, The Jackson Construction Company, et al. Filed September 27th, 1917. File No. 26176.

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Supreme Court of the United States

OCTOBER TERM, 1918

No. 283

A. P. CHALKER, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF J. W. WRIGHT, JR., DECEASED, AND C. E. PIGFORD, PLAINTIFFS IN ERROR,

vs.

THE BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY, THE JACKSON CONSTRUCTION COMPANY, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

STATEMENT OF THE CASE, ASSIGNMENTS OF ERROR, BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

WATSON E. COLEMAN,
C. E. PIGFORD,
BOND & BOND,
W. N. KEY,
Attorneys for Plaintiff in Error.

LONG-JOHNSON, JACKSON, TENN.

Supreme Court of the United States

OCTOBER TERM, 1918

No. 283

A. P. CHALKER, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF J. W. WRIGHT, JR., DECEASED, AND C. E. PIGFORD, PLAINTIFFS IN ERROR,

vs.

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STATEMENT OF THE CASE, ASSIGNMENTS OF ERROR, BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

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TABLE OF CASES

STATEMENT OF THE CASE.

J. W. Wright, Jr., a resident and citizen of the State of Alabama, a railroad contractor, engaged in the business of building and constructing railroads, with his chief office at Union Springs, in the State of Alabama, instituted this suit in the Chancery Court of Madison County, Tennessee, on the 19th day of March, 1912, against the Birmingham & Northwestern Railway Company, a railway corporation chartered and organized under the laws of the State of Tennessee, for the purpose of building and operating a line of railroad in Tennessee from Jackson in Madison County, Tennessee, through the Counties of Madison, Crockett and Dyer to Dyersburg, in Dyer County, Tennessee; the Jackson Construction Company, a corporation chartered under the laws of the State of Tennessee, to carry on a railroad construction business, and primarily to build the above line of railroad; and R. M. Hall, who was the promoter of both of said corporations, and an officer in both corporations.

Printed Record, pp. 1-49.
Contract, pp. 103-111.

By the bill it is shown, and it is admitted in the answers of the defendants, that the original contract for the building and construction of said railroad was let to the Jackson Construction Company, and that the contract was sublet by the Jackson Construction Company to J. W. Wright, Jr., and that the performance of the contract of the Jackson Construction Company with J. W. Wright, Jr., as to payment for work and labor to be done and performed and materials to be furnished by

the said Wright, Jr., was guaranteed by the defendant, R. M. Hall.

Amended and supplemental bills were filed and several amendments were allowed amplifying various charges as contained in the original bill and setting up other matters, all of which are set out at length in the record.

The bill as amended sought a recovery against the Jackson Construction Company and R. M. Hall for work and labor done and material furnished and damages sustained by reason of a breach of the contract by the Jackson Construction Company in an amount aggregating about One Hundred Thousand Dollars, and it was sought to have a lien declared against the line of railroad and its property for such recovery as might be given the complainant, J. W. Wright, Jr.

Elaborate answers were filed by the Birmingham & Northwestern Railway Company, the Jackson Construction Company and R. M. Hall in which general and specific denial was made of the allegations of the bill seeking a recovery against defendants and a lien against the railroad property, and setting up breaches of contract by the said J. W. Wright, Jr., and all of the answers set up the affirmative defense that the said Wright Jr., could not maintain his suit for the reason that he had not paid the privilege tax required by the revenue laws of the State of Tennessee, for doing a railroad construction business in Tennessee.

Record, pp. 50, 76, 90, 91.

The Jackson Construction Company filed its answer as a crossbill and sought affirmative relief against the

said J. W. Wright, Jr., for breach of contract, for damages and for other purposes.

During the pendency of the suit and before the trial in the Chancery Court of Madison County, Tennessee, J. W. Wright, Jr., the complainant died intestate, and the cause was revived in the name of Mrs. Susie E. Wright, his widow, who qualified as his administratrix. Subsequently and while the cause was pending in the Supreme Court of Tennessee, Mrs. Wright resigned the administration, and the cause was revived in the name of the plaintiff in error, A. P. Chalker, who qualified as administrator de bonis non of the estate of J. W. Wright, Jr., after the resignation of Mrs. Wright.

Record, pp. 49 and 132.

There was a trial before a jury in the Chancery Court of Madison County, Tennessee, in which fourteen issues of fact were submitted to the jury, but for the purposes of the hearing in this Court it is material to mention only two, the fourth and the sixth, which are as follows, together with the findings of the jury thereon, to-wit:

Fourth issue submitted to the jury:

> What, if anything, is the reasonable value of the benefits had and received by the Jackson Construction Company or the Birmingham and Northwestern Railway Company by reason of the work and labor done or material furnished by said J. W. Wright, Jr., or by his agents, employees or the subcontractors under him in building and constructing said railroad, over and above the amounts paid said Wright therefor or paid to other persons on his account or at his instance and request and over and above all damages, if any, sustained by said Jackson

Construction Company or by said Birmingham and Northwestern Railway Company by reason of the failure of said Wright or his agents, employees or subcontractors to complete said road according to the terms and specifications of said contract.

To which issue the jury responded:

$7,836.50
1,567.30 interest

$9,403.80

Sixth issue submitted to the jury:

Had the said J. W. Wright, Jr., at the time he contracted with the Jackson Construction Company, relative to the construction of the line of railway of the Birmingham & Northwestern Railway Company from Jackson, Tennessee, to Dyersburg, Tennessee, then paid the privilege tax required by the laws of Tennessee, and procured a license either in Madison, Crockett or Dyer Counties, Tennessee, authorizing him to engage in the business of constructing railroads in said Counties?

To which issue the jury responded:

NO.

Record, pp. 99-100-101-102.

Upon motion of the defendants below, the Chancellor set aside the verdict and finding of the jury as to issue number four, and thereafter, the Court, in view of the finding of the jury as to issue number six, upon motion dismissed the suit of the said J. W. Wright, Jr.

The decree of the Court on motions to dismiss being as follows:

"Be it remembered that this cause came on to be further heard on this the 8th day of November, 1915, upon the joint and separate motions of the defendants, Birmingham & Northwestern Railway Company, the Jackson Construction Company and R. M. Hall, to have the original, amended and supplemental bills filed by the complainant, J. W. Wright, Jr., dismissed, and upon the motion of complainant, to dismiss the cross-bill of the Jackson Construction Company filed in the cause.

"And it appearing to the Court that the said J. W. Wright, Jr., at the time of the making and execution of the contracts with the Jackson Construction Company, sued upon in this cause had not paid the privilege tax required to be paid by him by law and that for that reason his administratrix in whose name this cause has been revived is not entitled to maintain said action in so far as any relief is sought by virtue of said contracts, the Court so adjudges and decrees.

"It is therefore ordered, adjudged and decreed that the original, amended and supplemental bills in this cause, in so far as any relief is sought thereunder by virtue of the contracts sued upon therein be and the same are hereby dismissed, and said administratrix will be taxed with all the cost incident to the filing of said bills in so far as relief is sought under and by virtue of said contracts."

Record, pp. 113-114.

By subsequent decrees the bill and amended and supplemental bills were dismissed outright as to all of the defendants and the complainant below prosecuted a broad appeal to the Supreme Court of Tennessee for the Western Division of said State, sitting at Jackson, where the cause was heard at the April Term, 1917, of the Supreme Court of Tennessee.

Record, pp. 128-129-130.

In the Supreme Court the action of the Chancellor in setting aside the finding of the jury in response to issue Number 4, wherein the jury found that the Jackson Construction Company was indebted to complainant (plaintiff in error here) in the sum of $9,403.80, was held to be error, but the action of the lower court in dismissing complainant's original, amended and supplemental bills was affirmed, for the reason that the said J. W. Wright, Jr., had not paid the privilege tax required by the revenue laws of the State of Tennessee, and therefore could not maintain his suit.

Record, pp. 134-135-136-137.

That portion of the Supreme Court's opinion bearing on this phase of the matter is as follows:

> "The question remains whether the complainant is entitled to judgment on the amount found for him under issue No. 4—$9,403.80. The solution of this question depends on the construction of Sec. 4 of Chap. 479 Acts of 1909. That section as far as necessary to quote here, reads:
>
> > 'Section 4. Be it further enacted, that each vocation, occupation and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation, on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county court clerk as provided by law for the collection of revenue.
> >
> > * * * * * *
> >
> > 'Each foreign construction company, with its chief office outside of this State, operating or doing business in this State, directly or by agent, or by any subletting contract, each per annum in each county.....$100.00.
> >
> > 'Each domestic construction company and

each foreign construction company, having its chief office in this state, doing business in this state, each per annum, in each county.....$25.00.

'The above tax shall be paid by persons, firms, or corporations engaged in the business of constructing bridges, waterworks, railroads, street-paving construction work, or other work, or structure of a public nature.'

"Section 16 of the same Act reads:

'Be it further enacted, that it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all parties so offending shall be liable to a fine of not less than $10.00 nor more than $50.00 for each day such privilege is exercised without license, but this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce.'

"Complainant insists that section 4 discriminates between citizens of Tennessee and those of other states requiring the latter to pay a tax of one hundred dollars for the privilege of doing railroad construction business here, while citizens of this state are required to pay only twenty-five dollars, hence, that the section is in conflict with Art. IV., Sec. 2, subsec. 1, of the Federal Constitution, and also with the fourteenth amendment to the same instrument. In our judgment the construction suggested is not a sound one. The determining feature in the legislation quoted is the having of one's chief office in this State. Any citizen of this State, as well as any citizen of a foreign State, who has his chief office out of the State, must pay the one hundred dollars tax; so of any domestic corporation, as well as foreign corporation, having its chief office out of the State. Any foreign corporation or citizen of another State, or firm, as well as domestic corporations, citizens of this State, and firms of this

State, having its or their chief office in this State are all alike entitled to carry on a railroad construction business here on the payment of $25.00. There is no discrimination at all.

"It is not denied that complainant failed to pay the tax before he did the work. After the work was performed and before suit brought he paid the $25.00 tax. This was too late, even if he had paid the $100, *the tax applicable to his situation, he being a citizen of Alabama with his chief office there.* It was too late because payment of a privilege tax and procurement of a license after the privilege has been exercised, though before suit is brought will not give the party so paying any right to maintain suit. *Saule v. Ryan,* 53 S. W. (Tenn.) 977. The complainant having acted in violation of a statute in undertaking and transacting the business cannot recover. *Stevenson v. Ewing,* 3 Pick. (87 Tenn.), 46; *Pile v. Carpenter,* 118 Tenn. 288.

"The result is the decree of the chancellor dismissing the bill must be affirmed, with costs."

Record, pp. 136-137.

The decree of the Supreme Court of Tennessee, entered in pursuance of the said opinion of the Court is as follows:

"Be it remembered that this cause came on this day to be heard upon the transcript of the record, of the Court below, assignments of error, briefs and reply briefs, whereupon it is ordered, adjudged and decreed by the Court that the decree of the Chancellor dismissing complainant's bill, be, and the same is affirmed, and the said bill is hereby dismissed for the reasons and on the grounds set forth in the opinion of the Court this day filed in this cause, which opinion is hereby made a part of this decree, as fully as if set forth herein, in haec verba, and in the event this case shall hereafter be trans-

ferred to the Supreme Court of the United States, on petition for writ of error, or otherwise, the Clerk of this Court shall include a copy of said opinion as a part of the transcript of the record and of this decree."

Record, p. 134.

The only question involved in this case in this Court is the constitutionality of that part of Chapter 479 of the Acts of 1909 of the General Assembly of Tennessee regulating the privilege of railroad construction work in Tennessee.

If this portion of the said act is valid and constitutional, the decree of the Supreme Court of Tennessee is correct. If this act is invalid, the plaintiff in error is entitled to a decree for the sum of $9,403.80, and interest as held by that Court, and its decree dismissing said suit because of the non-payment of the privilege tax should be reversed and the cause remanded.

ASSIGNMENTS OF ERROR.

First.

The Supreme Court of Tennessee erred in dismissing the Original, Amended and Supplemental Bills of the complainant, J .W. Wright, Jr., in said cause, and in declining and refusing to render a decree in said cause in favor of A. P. Chalker, Administrator de bonis non of the estate of J. W. Wright, Jr., deceased, in whose name said cause had been revived, for the sum of Nine Thousand Four Hundred and Three Dollars and eighty cents and interest, and in denying complainant any relief in said cause, and in taxing the said A. P. Chalker, Administrator aforesaid, and C. E. Pigford, his surety, with the costs of the cause, and in adjudging and decreeing that the said J. W. Wright, Jr., was liable for the payment of a privilege tax for engaging in and carrying on a construction business in Tennessee, under the provisions of the Revenue Act of Tennessee of 1909 as shown in the first paragraph of the Revenue Act of 1909, Chapter 479, Section 4, at pages 1726 and 1735 of the Acts of the General Assembly of Tennessee for 1909, which is as follows, viz:

> "Section 4. Be it further enacted, that each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the County Court Clerk as provided by law for the collection of revenue.
>
> * * * * * * *
>
> CONSTRUCTION COMPANIES.
>
> Each foreign construction company, with its chief office outside of this state, operating or doing busi-

ness in this state, directly or by agent, or by any subletting contract, each per annum, in each county .....$100.00.

Each domestic construction company and each foreign construction company, having its chief office in this state, doing business in this state, each per annum, in each county.....$25.00.

The above tax shall be paid by persons, firms or corporations engaged in the business of constructing bridges, waterworks, railroads, street paving construction work, or other work, or structure of a public nature.

* * * * * * *

Section 16. Be it further enacted, that it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all parties so offending shall be liable to a fine of not less than $10.00 nor more than $50.00 for each day such privilege is exercised without license, but this inhibition shall not apply to any person, firm, or corporation engaged in interstate commerce."

Because said above provisions of the Revenue Act of 1909 fixing a privilege tax against persons, firms and corporations for engaging in and carrying on a construction business is unconstitutional and void in that there is a discrimination against non-residents of Tennessee in that a tax of $100.00 is levied against non-resident persons, firms and corporations, not having their chief office in Tennessee, while a tax of only $25.00 is levied against residents of Tennessee, and persons, firms and corporations having their chief office in Tennessee, and thereby abridges the privileges and immunities of citizens of the United States not residents of Tennessee, and denies to citizens of the United States not citizens of Tennessee, the equal protection of the law.

The pleadings show, the proof establishes, and the Supreme Court of Tennessee found, that at the time of the making of the contracts sued upon in this cause and at the time the work was done under the contracts and for which compensation was sought by J. W. Wright, Jr., in his Original, Amended and Supplemental bills in this cause that the said J. W. Wright, Jr., was a resident and citizen of the State of Alabama, having his chief office and principal place of business at Union Springs in the State of Alabama.

The constitutional provisions violated by said section of said Act are as follows:

Constitution of the United States, Article IV, Section 2:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

SECOND.

The Supreme Court of Tennessee erred in affirming the decree of the Chancery Court of Madison County, Tennessee, which Court decreed as follows:

"That the said J. W. Wright, Jr., at the time of the making and execution of the contracts with the Jackson Construction Company, sued upon in this cause, had not paid the privilege tax required to be paid by him by law, and that for that reason his administratrix in whose name this suit has been revived is not entitled to maintain said actions, insofar as any relief is sought by virtue of said contracts."

1. Because the first paragraph of that part of the Revenue Act of 1909, Chapter 479, Section 4, page 1726 and 1735, viz:

"Each foreign construction company, with its chief office outside of this state, operating or doing business in this state, directly or by agent, or by any subletting contract, each per annum, in each county, $100.00."

Is unconstitutional and void in that it discriminates against non-residents of Tennessee and in favor of residents of Tennessee, by imposing a tax of $100.00 against non-resident persons, firms and corporations doing a construction business in Tennessee, while by the next section of said Act a tax of only $25.00 is imposed upon resident persons, firms and corporations doing a construction business in Tennessee, thereby violating the provisions of Article IV, Section 2, of the Constitution of the United States, and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

2. Because the said Act of 1909, Chapter 479, is not applicable to the said J. W. Wright, Jr., and he is not liable for any tax after the said unconstitutional section

has been eliminated, he not being a resident or citizen of Tennessee, and not having his chief office in Tennessee, as provided in said Act.

THIRD.

The Court erred in affirming the decree of the Chancery Court, wherein said Chancery Court decreed as follows:

> "That the complainant, Susie E. Wright, Administratrix of J. W. Wright, Jr., deceased, in whose name this suit was revived, is entitled to no relief against the defendants, Jackson Construction Company and R. M. Hall, and it is accordingly so ordered, adjudged and decreed, and it is therefore by the Court ordered, adjudged and decreed that the original, amended and supplemental bills filed by the complainant in this cause be and the same are hereby dismissed in all things as to the said defendants, Jackson Construction Company and R. M. Hall."

Because of the several reasons set forth under the first and second assignments of error.

Record, pp. 145-146-147.

BRIEF.

No state possesses the power or authority to pass any law abridging the privileges or immunities of citizens of the several States, nor to deny to any person within the State the equal protection of the law, and the Act of 1909, Chapter 479, Section 4, on pages 1726 and 1735, applicable to construction companies, discriminates against non-residents, having their chief office outside of the State, and in favor of domestic construction companies and foreign construction companies having their chief office in this State, by imposing a tax of $100.00 upon the one, and a tax of only $25.00 upon the others, and is therefore unconstitutional and void.

Constitution of the United States, Article IV, Section 2, and the "Equal Protection" clause of the Fourteenth Amendment.
Ward vs. Maryland, 12 Wall. 418, 20 L. ed. 449.
Walling vs. Michigan, 116 U. S. 446, 29 L. ed. 691.
Darnell vs. Memphis, 208 U. S. 113, 52 L. ed. 413.
Southern Railway Co. vs. Greene, 216 U. S. 400, 54 L. ed. 536.
Welton vs. Missouri, 91 U. S. 275, 23 L. ed. 347.
Guy vs. Baltimore, 100 U. S. 434, 28 L. ed. 743.

Statutes which have the effect and operation of discriminating against the citizens of other states are equally as invalid and unconstitutional as those which expressly so discriminate.

Minnesota vs. Barber, 136 U. S. 313, 34 L. ed. 455.
Brimmer vs. Rebman, 138 U. S. 78, 34 L. ed. 862.
Robbins vs. Taxing District, 120 U. S. 489, 30 L. ed. 694.
State v. Bayer, 34 Utah 257, 19 L. R. A. (N. S.) 297, 97 Pac. 129.

State vs. Wright, 53 Ore. 344, 21 L. R. A. (N. S.) 349, 100 Pac. 296.
Smith v. Farr, 46 Colo. 364, 104 Pac. 401.

The rule against discriminations and guaranteeing all persons the equal protection of the laws extends to aliens as well as citizens, and even the police power must not be exercised arbitrarily; it must be so exercised as not to deny to any person the equal protection of the law.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220.
Chy Lung v. *Freeman*, 92 U. S. 275, 23 L. ed. 550.

Not only are the States prohibited from discriminating against the citizens of other States and in favor of citizens of the respective States, but they are likewise prohibited from discriminating against the products of other States and in favor of products of the respective states.

Darnell vs. Memphis, 208 U. S. 113, 52 L. ed. 413.

The discriminations, which are open to objections, are those where persons engaged in the same business are subject to different restrictions, or held entitled to different privileges under the same conditions.

Soon Hing v. Crowley, 113 U. S. at page 709, 5 Sup. Ct. at page 733, 28 L. ed. 1145.

Classification to relieve a law from the charge of a denial of equal protection cannot be made arbitrarily, but must be based upon some difference which bears a just and proper relation to the attempted classification.

Gulf, C. & S. F. Ry. v. Ellis, 165 U. S. 155, 157, 17 Sup. Ct. 255, 41 L. ed. 660.

This court determines for itself the construction and

effect of any statute of a State brought under review, without reference to the previous adjudication of the highest court of the State on the subject.

United States vs. Muscatine, 8 Wall. 575-587, 19 L. ed. 493.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 225.

BRIEF AND ARGUMENT.

The several assignments of error seek to present only one proposition of law and that is: Whether or not Chapter 479 of the Acts of 1909 of the General Assembly of Tennessee in so far as the same attempts to levy a privilege tax against persons, firms and corporations for doing a construction business in Tennessee is valid and constitutional in so far as the same applies to citizens of other States than Tennessee.

This is a suit by a railroad contractor who was himself a subcontractor, to recover from the original contractor for work and labor done and performed and material furnished in the building of a line of railroad from Jackson to Dyersburg, Tennessee, and to enforce the payment of such recovery against the property and line of railroad of the railroad company.

If the occupation tax is valid and constitutional as to citizens of other states, then plaintiff in error's intestate was doing business in Tennessee in violation of law and there could be no recovery. If the act in question discriminates against non-residents of Tennessee, it is unconstitutional and void, and plaintiff in error would be entitled to a recovery in the sum of $9,403.80, as will appear from the opinion of the Supreme Court of Tennessee hereinbefore referred to.

Record, p. 136.

The facts of the case have been found by the Supreme Court of Tennessee, and briefly stated are: That J. W. Wright, Jr., at the time of making the contract in question, was a non-resident of the State of Tennessee,

and a resident and citizen of the State of Alabama, with his chief office in the State of Alabama, and that the tax for which he was liable under the law if valid was the sum of $100.00, while under the same law citizens of Tennessee, having their chief office in Tennessee, were liable for a tax of only $25.00 for doing the same character of business.

Record, p. 137.

So that as construed by the Supreme Court of Tennessee, the State can fix one amount to be paid by a person exercising a privilege when his chief office is located in the State, and another and greater amount when his chief office is out of the State. However, the Court did hold in this particular instance, that citizens of Tennessee, with their chief office out of the State, are liable for the larger tax as well as citizens of other States, the Court saying in its opinion on page 137 of the printed record: "Any citizen of this State, as well as any citizen of a foreign State, who has his chief office out of the State, must pay the one hundred dollars tax; so of any domestic corporation, as well as foreign corporation, having its chief office out of the State." But we respectfully insist and show to the Court that this quoted statement from the opinion of the Supreme Court of Tennessee ins in direct and clear conflict with the plain and unambiguous statement of the statute itself, which reads:

> "Each foreign construction company, with its chief office outside of this State, operating or doing business in this State directly, or by agent, or by any subletting contract, each per annum, in each county _____ $100.00."

This is the only provision in the act mentioning a construction company with its chief office outside of the State, and it certainly could not be contended that a domestic construction company, whether person, firm, or corporation, could under any circumstances be construed to be a foreign company merely by reason of the fact that its chief office might be located in another State. We think that the correct rule is that a company composed of residents and citizens of Tennessee would be a domestic company whether its chief office were located in Tennessee or out of Tennessee, and certainly an incorporated construction company chartered and organized under the laws of Tennessee would be a domestic company regardless of the location of its chief office. Under the facts that part of the Court's opinion is clearly merely a dictum and not binding upon this Court, it not being within the province of the Supreme Court of Tennessee to construe away a plain discrimination in the statute by such a forced and unwarranted construction.

The privilege tax in question is levied by the State of Tennessee as a revenue measure pure and simple, and the question of regulating a public business other than for revenue, and the exercise of the police power by the State does not enter into the consideration of this case, and in order that this fact may be clearly before the Court we cite below every portion of the revenue law passed by our Legislature in 1909, under which the tax was held to be payable, which is Chapter 479 of the Acts of 1909 of the General Assembly of Tennessee, and is as follows:

CHAPTER 479.

SENATE BILL No. 842.

(By Messrs. Lane, Fisher, and Cummings.)

AN ACT TO PROVIDE REVENUE FOR THE STATE OF TENNESSEE AND THE COUNTIES AND MUNICIPALITIES THEREOF.

SECTION 1. *Be it Enacted by the General Assembly of the State of Tennessee,* That the taxes on every $100 worth of property shall be 50 cents for the year 1909 and for every subsequent year thereafter, 35 cents of which shall be for State purposes and 15 cents for school purposes; that there shall be levied and collected a collateral inheritance tax as provided for in Chapter 174 of the Acts of 1893 and Acts amendatory thereof.

SEC. 2. *Be It Further Enacted,* That the several County Courts of this State be, and they are hereby, authorized and empowered to levy an annual county tax on every $100 worth of taxable property not exceeding 30 cents upon the $100 worth of property, and exclusive of the tax for public roads and pikes and schools and interest on county debts and other special purposes; and each county and municipality in this State is hereby authorized and empowered to levy a privilege tax upon merchants and such other vocations, occupations, or businesses as are named in this Act and declared to be privileges, not exceeding in amount that levied by the State for State purposes. The imposition of a privilege tax under this Act shall not be construed as a release or exemption from an ad valorem tax unless otherwise expressly provided; nor shall this Act be construed as repealing any special Act heretofore passed imposing a privilege tax; *provided,* that any indigent ex-Confederate or ex-Federal soldier doing a privilege business, with a capital not exceeding $250, shall be exempt from paying the privilege tax herein provided for.

SEC. 3. *Be It Further Enacted,* That all merchants shall pay an ad valorem tax upon the average capital invested by them in their business of 50 cents on the $100, 35 cents of which shall be for State purposes and 15 cents for school purposes; and a privilege tax of 15 cents on each $100 worth of taxable property, 7½ cents of which shall be for school purposes and 7½ cents for State purposes; *provided,* that such privilege tax, without regard to the length of time they do business, shall in no case be less than $5. The $5 paid shall be a credit when the balance of the tax is paid; *provided, further,* that said $5 shall be equally divided between the State and counties; *provided, further,* that when the stock is less than $800, the privilege shall be fixed at $7.50 per annum, and that no ad valorem shall be taxed.

SEC. 4. *Be It Further Enacted,* That each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the County Court Clerk as provided by law for the collection of revenue.

* * * * * * * *

(Here follows in alphabetical order a list of the various vocations, occupations and businesses which are declared to be privileges together with the rates of taxation on each.)

CONSTRUCTION COMPANIES.

Each foreign construction company, with its chief office outside of this State, operating or doing business in this State, directly or by agent, or by any subletting contract, each, per annum in each county ..... $100.00.

Each domestic construction company and each foreign construction company, having its chief office in this State, doing business in this State, each, per annum, in each county..... $25.00.

> The above tax shall be paid by persons, firms, or corporations engaged in the business of constructing bridges, waterworks, railroads, street-paving construction work, or other structures of a public nature.
>
> * * * * * * * *
>
> SEC. 16. *Be It Further Enacted,* That it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all parties so offending shall be liable to a fine of not less than $10 nor more than $50 for each day such privilege is exercised without license; but this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce."
>
> * * * * * * * *

According to our view of this Act it simply means that there is levied and fixed a privilege of one hundred dollars per annum against non-resident persons, firms and corporations doing a construction business in Tennessee, *and not having their chief office in Tennessee,* and a privilege tax of twenty-five dollars per annum against resident persons, firms and corporations, and non-resident persons, firms and corporations having their chief office in Tennessee, and that the said provisions of the Act in question admit of no other construction.

If such is the true meaning and intention of the Act, it is clearly unconstitutional and void so far as non-residents are concerned, because discriminatory in that it denies to citizens of other States the privileges and immunities accorded to citizens of Tennessee and would be a denial to citizens of other States of the equal protection of the laws of Tennessee by placing a heavier

burden upon citizens of other states than are placed upon citizens of Tennessee for the privilege of engaging in the construction business.

Before a citizen of the State of Alabama can come into the State of Tennessee and engage in the construction business upon equal terms with the citizens of Tennessee, the burden is placed upon the citizen of Alabama of moving his chief office into Tennessee, even though he desired to engage in but one undertaking and perform but one contract as was the case of J. W. Wright, Jr., for the building of the Birmingham & Northwestern Railroad is the only contract he is shown ever to have had or undertaken in Tennessee.

This clearly discriminates against the citizens of other states.

If the State of Tennessee can thus discriminate against the citizens of other States she can entirely exclude them, by placing prohibitive privilege taxes against them.

"The power to tax is the power to destroy," said Chief Justice Marshall.

If the State of Tennessee has the power and authority to place a tax of $100 against non-residents who do not choose to move their chief office to Tennessee, while it only levies a tax of $25 against citizens of Tennessee and non-residents having their chief office in Tennessee, then the State could levy a tax of $1000 against citizens of other states not having their chief office in Tennessee.

Under the Revenue Act quoted above, and the subsequent Revenue Acts as to that matter, it is provided that the counties and municipalities may levy the same privilege tax that is levied by the State not to exceed the amount levied by the State, so that under the law in question a non-resident not having his chief office in Tennessee doing business in a municipality of Tennessee, executing a street-paving contract, for instance, would have to pay a privilege tax of $300 while a resident would have to pay only $75.

To show the policy of the Legislature of Tennessee to discriminate against citizens of other States engaged in the construction business, the attention of the Court is called to the fact that the Revenue Act of 1915, being Chapter 101, page 263 and 273, of the Public Acts of 1915 of the General Assembly of Tennessee, levies the privilege tax against construction companies as set out in the Acts of 1909, Chapter 479, above quoted, but raised the amount against non-resident or foreign construction companies not having their chief office in Tennessee from $100 to $150 while the tax against domestic construction companies was permitted to remain at $25.

Under the Revenue Act of 1915, a foreign construction company, whether person, firm or corporation, not having its chief office in Tennessee, in order to execute a $1000 street-paving contract in the City of Jackson in Madison County, Tennessee, would be required to pay an aggregate privilege tax for carrying on a construction business in the sum of $450, while a domestic construction company would be required to pay only $75.

It seems to us that not only does the statute in question discriminate between the citizens and residents of Tennessee, but the subsequetnt enactment of the Legislature of the State of Tennessee on this question shows a settled policy so to discriminate against non-residents and citizens of other States.

The Constitution of the United States, Article IV, Section 2, subsection 1, provides that:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In the case of *Elias Ward vs. State of Maryland*, 12 Wall. 418, 20 L. ed. 449, the Supreme Court of the United States, in an opinion by Mr. Justice Clifford, held that a statute of a State which prohibits the sale, within a certain district of the State, of goods other than agricultural products and articles manufactured in the State, by persons not residents in the State, without first obtaining a license and paying therefor is unconstitutional, because it is repugnant to the second sec-

tion of the fourth article of the Constitution, which provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

In the case of *Ward vs. Maryalnd,* supra, there was also involved a question of interstate commerce in that there was a discrimination against the products of other states but the Court based its decision upon the fact of the discrimination between the citizens of Maryland and the citizens and residents of other States.

In deciding the case of *Ward vs. Maryland,* the Court said:

> "Imposed as the exaction is upon *persons not permanent residents* in the State, it is not possible to deny that the tax is discriminating with any hope that the proposition could be sustained by the Court. Few cases have arisen in which this court has found it necessary to apply the guaranty ordained in the clause of the Constitution under consideration. *Conner vs. Elliott,* 18 How. 593.
>
> "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the Court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the Courts of the State; and *to be exempt from any higher taxes or excises than are imposed by the State upon its own*

citizens. Cooley, Const. Lim., 16; *Brown vs. Maryland* 12 Wheat, 449.

"Comprehensive as the power of the States is to lay and collect taxes and excises, it is, nevertheless, clear, in the judgment of the Court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and, inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the State might sell, or offer or expose for sale in that district, *without being subjected to any higher tax or excise than that exacted by law of such permanent residents. State vs. North,* 27 Mo. 467; *Fire Dep. v. Wright,* 3 E. D. Smith, 478; *Paul v. Virginia,* 8 Wall. 177.

"Grant that the States may impose discriminating taxes against the citizens of other States, and it will soon be found that the power conferred upon Congress to regulate interstate commerce is of no value, as the unrestricted power of the States to tax will prove to be more efficacious to promote inequality than any regulation which Congress can pass to preserve the equality of right contemplated by the Constitution among the citizens of the several States. Excise taxes, it is everywhere conceded, may be imposed by the States, if not in any sense discriminating; but it should not be forgotten that the people of the several States live under one common Constitution, which was ordained to establish justice, and which, with the laws of Congress, and treaties made by the proper authority, is the supreme law of the land; *and that that supreme law requires equality of burden, and forbids discrimination in state taxation when the power is applied to the citizens of the other States.* Inequality of bur-

den, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy these defects in the prior system."

* * * * * * *

"Important as these provisions have been supposed to be, still it is clear that they would become comparatively valueless if it should be held that each State possesses the power in levying taxes for the support of its own government to discriminate against the citizens of every other State of the Union."

* * * * * * *

"Viewed in any light the court is of the opinion that the statute in question imposes a discriminating tax upon all persons trading in the manner described in the district mentioned in the indictment, *who are not permanent residents of the State,* and that the statute is repugnant to the Federal Constitution, and invalid for that reason."

Ward v. Maryland, 12 Wall. 418-433, 20 L. ed. 450-453.

The case of *Ward vs. Maryland,* supra, was decided by the Supreme Court of the United States in December, 1871, and has been followed in numerous cases since that time, and has never been modified in any manner so far as we have been able to find.

In the case of *Samuel A. Walling vs. People of the State of Michigan,* 116 U. S. 446-461, 29 L. ed. 691, the Supreme Court of the United States held that a State law which imposes a specific tax on persons engaged in the business of selling liquors at wholesale, or of soliciting or taking orders for such liquors to be shipped into the State from places out of the State, not having their

principal place of business in the State, without imposing a like tax upon persons engaged in the like business in reference to liquors manufactured in the State, is unconstitutional and void, because such a law discriminates unfavorably against the citizens and products of other States and, therefore, is a regulation of commerce repugnant to the Constitution of the United States.

In *the Walling vs. Michigan* case, supra, the Court further held that a law subsequently passed, imposing a greater tax upon all persons engaged in any city, township or village in the business of manufacturing or selling liquors in the State, does not have the effect of divesting the first law of its objectionable character, not being imposed upon the same class of persons, but being imposed on the principal dealers and not on their servants, clerks or drummers.

The statute under consideration in the *Walling* case was an act of the Legislature of the State of Michigan passed in the year 1875, the first section of which is as follows:

> "SECTION 1. *The People of the State of Michigan Enact*: That every person who shall come into, or being in this State, shall engage in the business of selling spiritous and intoxicating, malt, brewed or fermented liquors to citizens or residents of this State, at wholesale, or of soliciting or taking orders from the citizens or residents of this State for any such liquors to be shipped into this State or furnished, or supplied at wholesale to any person within this State, not having his, their or its principal place of business within this State, shall, on or before the fourth Friday of June in

> each year, pay a tax of $300 if engaged in selling, or soliciting or taking orders for the sale of such spiritous and intoxicating liquors, and $100 for malt, brewed or fermented liquors. Such tax shall be paid to the Auditor-General and be by him paid into the State treasury, to the credit of the general fund."

The enactment clearly shows that liability for the tax in question was determined by the location of the principal place of business of the person to be taxed, and in disposing of the matter of discrimination presented in that case the court said:

> "The single question, therefore, is whether the statute of 1875 is repugnant to the Constitution of the United States. Taken by itself and without reference to the Act of 1881, it is very difficult to find a plausible reason for holding that it is not repugnant to the Constitution. It certainly does impose a tax or duty on persons who, not having their principal place of business within the State, engage in the business of selling, or of soliciting the sale of certain described liquors, to be shipped into the State. If this is not a discriminating tax levied against persons for selling goods brought into the State from other States or countries, it is difficult to conceive of a tax that would be discriminating. It is clearly within the decision of *Welton v. Missouri*, 91 U. S. 275, where we held a law of the State of Missouri to be void which laid a peddler's license tax upon persons going from place to place to sell patent and other medicines, goods, wares, or merchandise, not the growth, product or manufacture of that State, and which did not lay a like tax upon the sale of similar articles, the growth, product, or manufacture of Missouri. The same principle is announced in *Hinson v. Lott*, 8 Wall. 148; *Ward v. Maryland*, 12 Wall. 418; *Guy*

v. Baltimore, 100 U. S. 438; *County of Mobile v. Kimball,* 102 U. S. 691; *Webber v. Virginia,* 103 U. S. 344."

* * * * * * *

"Another argument used by the Supreme Court of Michigan in favor of the validity of the tax is that it is merely a tax on an occupation which, it is averred, the State has an undoubted right to impose, and reference is made to *Brown v. Maryland,* 12 Wheat. 444; *Nathan v. La.,* 8 How. 80; *Pierce v. New Hampshire,* 5 How. 593; *Hinson v. Lott,* 8 Wall. 148; *Machine Co. v. Gage,* 100 U. S. 676. None of these cases, however, sustain the doctrine that an occupation can be taxed if the tax is so specialized as to operate as a discriminative burden against the introduction and sale of the products of another State, *or against the citizens of another State.*"

Walling v. Michigan, 116 U. S. 446-461, 29 L. ed. 691.

One of the late cases on the subject of discrimination is that of *I. M. Darnell & Son Company v. City of Memphis,* reported in 208 U. S. 113, 52 L. ed. 413. In the case the question of discrimination is discussed at length and the authorities reviewed. In this case it is said:

"As there can be no doubt within the principles so clearly settled by the decided cases, to which we have referred, that the disputed tax which the Court below sustained, was a direct burden upon interstate commerce, since the law of Tennessee in terms discriminated against property the product of the soil of other States brought into the State of Tennessee, by exempting like property when produced from the soil of Tennessee, it follows that the Court below erred in deciding the tax to be valid, without reference to the reason indulged in by it concerning the application of the equal protection clause of the Fourteenth Amendment."

In reaching its conclusions in the *Darnell vs. Memphis* case, supra, the Court said further:

> "In *Webber vs. Virginia*, 103 U. S. 344, 26 L. ed. 565, a license statute of the State of Virginia was held to be a regulation of commerce and invalid, because the tax was made to depend on the foreign character of the articles dealt in; that is, upon their having been manufactured without the state. The Court said:
>
> > " 'If, by reason of their foreign character, the state can impose a tax upon them or upon the person through whom the sales are effected, *the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product.* It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several states.' "

It is true that the above case was one involving a discrimination against the products of other States and was decided as being in conflict with the commerce clause of the Constitution, but certainly the reasoning holds good when there has been an attempt to discriminate against the citizens of other states, because after all the discrimination against products vitiates a law for the reason that in its last analysis it is the rights of citizens that are sought to be protected from discriminating legislation, whether affecting their persons or their property.

In the case now before the Court, as we have previously stated, we now reiterate, that inasmuch as the Rev-

enue Law of Tennessee discriminates in the amount of privilege tax by reason of the foreign character of a citizen doing a construction business in Tennessee, or by reason of the place of location of his chief office, there is a discrimination that is unlawful and renders the act invalid.

In the case of *Southern Railway vs. Greene,* 216 U. S. 400, 54 L. ed. 536, which arose under a statute of the State of Alabama, by which a larger annual franchise tax was levied against a foreign corporation than was levied against domestic corporations, the Supreme Court of the United States in declaring the act void used the following plain and unambiguous language:

> *"We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State, does violence to the Federal Constitution."*

The case of J. W. Wright, Jr., is much stronger than the Alabama case and likewise much stronger than the cases in which there were discriminations against products and manufacturers of other States. In the Alabama case above mentioned it was attempted to impose higher taxes upon foreign corporations under the guise of an annual franchise tax, and in the cases involving discriminations against foreign products or manufacturers the courts of the offending states have sought to justify them as police regulations and inspec-

tion laws for the protection of the public health, but in the case of the construction company tax in Tennessee, the tax is imposed as an occupation tax pure and simple for the purpose of raising revenue by taxing various occupations declared to be privileges, and it attempts to make the citizens of other states bear an unequal share of the public burden by requiring them to pay a higher tax than citizens or move their principal place of business or chief office into Tennessee.

Upon the above principles we insist that so much of the Revenue Act of the General Assembly of Tennessee of 1909 as levies a privilege tax of one hundred dollars per annum against foreign construction companies, which includes persons, firms and corporations, having their chief office outside of the State of Tennessee, while only twenty-five dollars is levied against domestic construction companies and foreign construction companies having their chief office in the State of Tennessee, which likewise include persons, firms and corporations, is unconstitutional and void and cannot be sustained.

J. W. Wright, Jr., at the time of the making and carrying out of the contract sued upon in this cause was a resident and citizen of the State of Alabama, had been such for over fifteen years, and was engaged in the railroad construction business with his chief office at Union Springs, Alabama, where his home was located and where his family lived and had always lived, and he never had a chief office in Tennessee, in fact his only offices in Tennessee were temporary offices maintained for the carrying out of the contract in question, and these temporary offices were moved from place to place

and from time to time to keep up with the work being done under the particular contract in question, and they were not maintained for any other work or purpose than that of directing the work that was being done upon the line of railway of the Birmingham & Northwestern Railway Company under his contract with the Jackson Construction Company.

Mrs. Wright, the widow of J. W. Wright, Jr., testified that at the time of his death in March, 1913, J. W. Wright, Jr.'s home was Union Springs, Alabama, and that he had been living there nearly fifteen years, that he was engaged in the building of railroads and highways, and that his head office was in Union Springs, Alabama, in a building owned by Mrs. Wright and that he did business in several States in the South and that all of his contracts were taken from his home office. Her testimony further shows that all of his stationery was printed showing his "Home Office," Union Springs, Alabama.

Printed Record, pp. 115, 116, 117, 118, 119, 120, 121.

George H. Palmer testified that Mr. Wright's head office was in Union Springs, Alabama, and that was his headquarters from which he carried on extensive construction work, being regarded as one of the largest contractors in the South in railroad work, and that he had in Tennessee only temporary offices in a tent or box car along where the work was being done for the purpose of directing the work on this contract.

Printed Record, pp. 121, 122, 123.

The Supreme Court found as a fact that Mr. Wright was a citizen of the State of Alabama with his chief

office there, as will appear from the opinion of the Court, from which we quote the following:

> *"He being a citizen of Alabama with his chief office there."*
>
> Printed Record, p. 137.

It can readily be seen that it would work a very great hardship under the circumstances to require Mr. Wright to move his chief office into Tennessee, to get the benefit of equality in taxation with citizens of Tennessee in payment of the privilege tax in question, when he had only one contract in Tennessee, and it is difficult to see how it can be argued with any hope of success that the tax in question did not discriminate against Mr. Wright and in favor of citizens of Tennessee.

In disposing of the question of discrimination in this case the Supreme Court of Tennessee has sought to avoid its discriminating character by holding that a citizen of Tennessee would be compelled to pay the $100 tax if his chief office were located outside of the State, but we respectfully show and insist that if this statement can be considered more than a mere dictum and is the solemn holding of the Court on that question it is an interpolation not warranted by any language used in the statute and that the Supreme Court of the United States is not bound by this statement which is clearly an addition to the express words of the statute which does not levy a tax of $100 against any person, firm or corporation, except foreign companies which includes persons, firms and corporations having their chief office outside of the State.

In the case of *United States vs. Muscatine,* reported in 8 Wallace 575-587, 19 L. ed. 493, the Court said:

"In all cases brought here under the 25th Section of the Judiciary Act this Court has never hesitated to determine for itself the construction and effect of any statute of a State brought under review, without reference to the previous adjudications of the highest court of the State upon the subject. In the opinion delivered in the case of *Jefferson Branch of the State Bank of Ohio v. Skelly,* 1 Black 436, it was well asked of what value would the appellate power of this court be to the party aggrieved, if such were not the rule. In that case and in all other cases brought here, involving the same question, an Act of the Legislature of Ohio was pronounced invalid and the judgments of the Supreme Court of the State were reversed. Cases may be brought here from the circuit court of such character that it is necessary to the right administration of justice that we should proceed upon the same principle in deciding them. Indeed, questions which are identical, may be brought here in both ways. Under such circumstances it will hardly be insisted that State adjudications are to control in one case and not in the other. Our duty depends upon the question involved, and not upon the channel through which the case comes before us. Where the settled decisions in relation to a statute, local in its character, have become rules of property, these remarks have no application. In such cases this court will, as it always has done, follow such adjudications. The cases of a different character, involving state statutes, in which the adjudications of the courts of the States in relation to them have been departed from by this court, extend in an unbroken series from an early period after its organiaztion to the present."

In the construction of statutes involving the rights of citizens of different States, this Court is not limited or bound by the construction placed thereon by the Supreme Court of a State. This Court construes such statutes independently and in so doing ascertains and adjudges their meaning.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 225.

We therefore respectfully submit that the decree of the Supreme Court of Tennnesssee should be reversed and the cause remanded.

Respectfully submitted,

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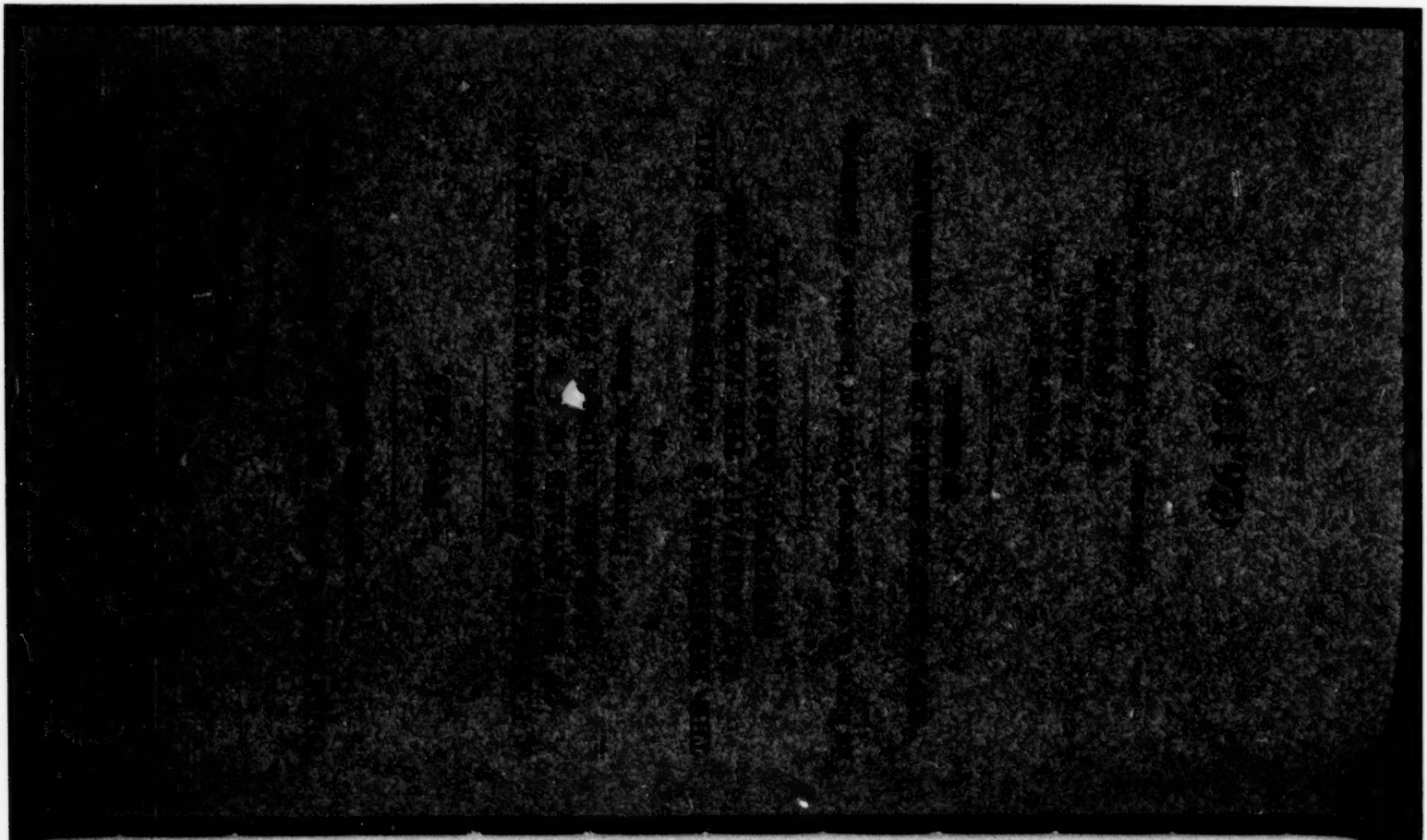

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TABLE OF CASES.

Supreme Court of the United States

OCTOBER TERM, 1918.

IN ERROR.

A. P. CHALKER, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF J. W. WRIGHT, JR., DECEASED, AND C. E. PIGFORD,

PLAINTIFFS IN ERROR,

vs.

THE BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY, THE JACKSON CONSTRUCTION COMPANY, ET AL.

In Error to the Supreme Court of the State of Tennessee.

REPLY BRIEF IN BEHALF OF THE DEFENDANTS IN ERROR.

Statement of the Case and the Issue.

The history of this case narrated in the brief of the plaintiffs in error, is correct as far as it goes, but it does not purport to be complete. It is perhaps important that a more comprehensive statement of the issues below be presented here, in order that it may definitely appear whether a Federal question is involved and if so, whether

the plaintiffs in error are in position to raise it, and also as to whether the assignments of error do not raise questions in the United States Court which were not raised in the State Courts.

J. W. Wright, Jr., a Railroad Contractor, filed his original, amended and supplemental bills in the Chancery Court of Madison County, Tennessee, seeking a recovery against the Jackson Construction Company for alleged balances due him for work he claimed to have performed in building a short line of railroad known as the Birmingham & Northwestern Railroad, located wholly in Tennessee, and for alleged damages, and seeking to have the amount of the recovery declared a lien on the railroad property, and also seeking a recovery against R. M. Hall upon the ground that he had become surety for the Jackson Construction Company and had guaranteed the performance of its contract.

The Jackson Construction Company and the Birmingham & Northwestern Railway Company answered denying that anything was owing to said J. W. Wright, Jr., but averred that he had been overpaid, that he had breached his contract in many particulars, and had damaged the defendants in a sum much larger than that claimed by said J. W. Wright, Jr., which they plead as a set-off. The said defendant, R. M. Hall, answered, denying any liability. All of the defendants made the further defense that said J. W. Wright, Jr., had failed to pay the privilege tax and to take out a license as required by law before undertaking said contract, and that his said con-

tract was therefore void and unenforcible, and that the complainant had no standing in Court.

Issues Submitted to Jury.

A jury having been demanded, the case was first tried to a jury upon fourteen issues. A concise statement of the issues and the responses of the jury thereon follows:

Issue No. 1. Is Exhibit "A" to complainant's original bill the original contract between J. W. Wright, Jr., and the Jackson Construction Company?

To which the jury responded: "Yes."

Issue No. 2. What amount, if any, is due the complainant for work performed or services rendered or materials furnished by said J. W. Wright, Jr., upon said railroad under his contracts?

To which the jury responded: "None."

Issue No. 3. Did the Jackson Construction Company breach its contract, if so what damages were sustained by said J. W. Wright, Jr.?

To which the jury responded: "Yes" and "None."

Issue No. 4. What is the value of the benefits received by the Jackson Construction Company and the Birmingham & Northwestern Railway Company by reason of the work done and materials furnished by J. W. Wright, Jr., his agents, employees or sub-contractors, over and above the amount paid or damages suffered?

To which the jury responded: "$7,836.50 and $1,567.30 interest."

Issue No. 5. Did J. W. Wright, Jr., give notice that he claimed a lien?

To which the jury responded: "Yes."

Issue No. 6. Had the said J. W. Wright, Jr., at the time he contracted with the Jackson Construction Company, paid the privilege tax as required by law, and procured a license authorizing him to engage in the business of constructing railroads?

To which the jury responded: "No."

Issue No. 7. Did the said J. W. Wright, Jr., at any time pay the privilege tax required by law and procure a license, and if so, when?

To which the jury responded: "Yes,"

"Paid in Crockett County March 18, 1912."

"Paid in Madison County March 14, 1912."

"Paid in Dyer County March 15, 1912."

Issue No. 8. Had the Jackson Construction Company, at the time it contracted with J. W. Wright, Jr., and the Birmingham & Northwestern Railway Company, paid the privilege tax as required by law and procured a license to construct railroads?

To which the jury responded: "No."

Issue No. 9. Did the Jackson Construction Company at any time pay the privilege tax required by law and procure a license, and if so when?

To which the jury responded: "No. in Dyer and Crockett Counties." "Yes, in Madison County. Paid March 26, 1912."

Issue No. 10. Was there any fraud or collusion between J. W. Wright, Jr., and the railroad engineer?

To which the jury responded: "No."

Issue No. 11. Did said J. W. Wright, Jr., breach his contract, and if so state the amount of damages sustained by the Jackson Construction Company?

To which the jury responded: "Yes," and "None."

Issue No. 12. What amounts were paid to J. W. Wright, Jr., or on his account, by the defendants?

To which the jury responded: "$124,483.47."

Issue No. 13. Was there any fraud in the monthly estimates prepared by the engineer?

To which the jury responded: "No."

Issue No. 14. Did the defendants pay out any sums in order to complete said railroad, with which said Wright should be charged, and if so what amounts, and by whom paid?

To which the jury responded: "None chargeable to J. W. Wright, Jr."

See Transcript of Record, pages 99 to 102.

No motion for a new trial was made by the complainant, but the defendants moved for a new trial as to certain issues and upon said motion the Chancellor set aside the findings of the jury as to issues numbers 4, 10, 12, 13,

14 and so much of the findings on Issue No. 11 as answered "None." So it appears that the Chancellor was dissatisfied with and disapproved the verdict of the jury on Issue No. 4, by which the jury found that the Jackson Construction Company and the Birmingham & Northwestern Railway Company had received benefits to the amount of $7,836.50, for which said Wright had not been paid; and the Chancellor set the same aside and granted a new trial as to said issue.

See Transcript of Record, p. 112.

Thereafter on November 8, 1915, the Chancellor decreed as follows:

> "And it appearing to the Court that the said J. W. Wright, Jr., at the time of the making and execution of the contracts with the Jackson Construction Company, sued upon in this cause, had not paid the privilege tax required to be paid by him by law and that for that reason his administratrix in whose name this cause has been revived is not entitled to maintain said action in so far as any relief is sought by virtue of said contracts, the Court so adjudges and decrees."
>
> See Transcript of Record, p. 113.

Thereafter on June 19, 1916, the Chancellor decreed as follows:

> "And the Court being of the opinion from a consideration of the entire record in the cause that the complainant Susie E. Wright, administratrix of J. W. Wright, Jr., deceased, in whose name this suit was revived, is entitled to no relief against the defendants, Jackson Construction Company and R. M.

Hall, it is accordingly so ordered, adjudged and decreed, and it is therefore by the Court ordered, adjudged and decreed the original, amended and supplemental bills filed by the complainant in this cause be and the same are hereby in all things dismissed as to the said defendants Jackson Construction Company and R. M. Hall."

See Transcript of Record, p. 127.

Thereafter the cause came on to be again tried before the Court and jury upon three issues, the substance of which and the responses of the jury thereto are as follows:

Issue No. 1. Did J. W. Wright, Jr., do any work, not as a contractor, in the building of the Birmingham & Northwestern Railroad from which he is entitled to pay, and if so state the kind and amount and what he should be paid therefor?

To which the jury responded by direction of the Court: "The said J. W. Wright, Jr. did no work for which he is entitled to pay."

Issue No. 2. Did said Wright furnish any materials for said railroad for which he should be paid, and if so the kind and amount and what he should be paid therefor?

To which the jury responded, under the direction of the Court: "The said J. W. Wright, Jr. did no work and furnished no materials for which he is entitled to pay."

Issue No. 3. State the fair, reasonable value of the benefits, if any, derived by the railway from work or material furnished.

To which the jury responded, under direction of the Court: "There were no benefits derived by said railroad from any material or work done by said J. W. Wright, Jr."

See Transcript of Record, p. 128.

The complainant appealed to the Supreme Court of the State, but what questions were made, or errors assigned there, do not appear, except inferentially from the opinion handed down by the State Supreme Court in the case.

There was no issue submitted as to said J. W. Wright's residence or citizenship, and no finding of fact thereon either way. The reference in the opinion of the State Supreme Court as to Wright's citizenship being merely parenthetical, or an assumption, and not an authoritative finding of fact. As to the location of Wright's chief office in connection with the work in Tennessee, the record contains the following proof:

> "The evidence further showed that J. W. Wright, Jr. after the original contract was made at once brought teams and implements for railroad building to Jackson, Tennessee and to other points on and along the proposed line of railway from Jackson in Madison County, Tennessee, to Dyersburg in Dyer County, Tennessee; that he opened an office at the beginning of the construction work in Jackson, Tennessee, near the depot of the Birmingham & Northwestern Railway where the same now is, which office

he maintained for a considerable portion of the time while the work of constructing said railroad was being done and from which office he transacted the principal portion of the business of constructing said railway; that after closing the office near the depot in Jackson, Tennessee, he procured a room at the Southern Hotel in Jackson, Madison County, Tennessee, from which he conducted correspondence and attended to various matters pertaining to the construction of said railway; that during a portion of the time while his office was located near said depot in Jackson, Tennessee, and after closing said office at said point he maintained offices in Crockett County and in Dyer County, Tennessee, on and along said proposed line of railway, but that he spent the greater part of the time during the construction of said road at Jackson, Tennessee, from which the principal part of the business of constructing said road was transacted, that he had an auditor who kept the books pertaining to said railway business at Jackson, Tennessee, either in the office near the depot or in the room at the Southern Hotel and that said auditor when said Wright was away from Jackson was in daily communication with him relative to the business of constructing said road, that in said offices were kept the records relative to the constructing of said railway during the construction thereof; that the sub-contracts were made in said offices, all of which matters were transacted either by the said J. W. Wright, Jr. in person or by his auditor, agents, or employees and that most of the work done in the constructing of said railway was performed during the year 1911 when he had such offices either in Madison, Crockett or Dyer Counties, Tennessee, but that as above stated the principal part of the work of superintending the construction

of said road and the making of said contracts was transacted in Madison County, Tennessee, during said period."

See Transcript of Record, pp. 125, 126.

JUDGMENT AND OPINION OF SUPREME COURT.

The State Supreme Court affirmed the decree of the Chancellor dismissing the complainant's bill, upon the grounds set forth in the opinion of the Court, except as to the defendant, R. M. Hall, with respect to which defendant the bill was dismissed "on the ground that he was only liable as surety on the contract, and the jury having found in response to Issue No. 2 that nothing was due on the contract, there could in no event be a recovery against the said Hall."

See Transcript of Record, p. 134.

In the opinion of the State Supreme Court the following points appear and are important:

1. The question of a lien on the railroad was not authoritatively determined.

2. The Court held that the action of the Chancellor in granting a new trial as to certain issues, was error for the technical reason that he should have granted a new trial as to all the issues or none.

3. That the complainant was not entitled to judgment on the amount found for him under Issue No. 4, because he did not pay the privilege tax required of him until after the work was performed, when he paid the $25.00 tax, which the Court held was "too late because payment

of a privilege tax and procurement of a license after the privilege has been exercised, though before suit brought, will not give the party so paying any right to maintain suit."

See Transcript of Record, pp. 134-137.

It will be noted that the judgments of the State Court are not predicated upon any finding of Wright's citizenship or residence.

Here also we direct the attention of the Court to the definite language found in the opinion of the State Supreme Court relative to the insistence made by the plaintiff in error in said Court in regard to the construction and effect of the State statute there assailed, as compared with the first and second assignments of error now made in this Court.

In its opinion the State Supreme Court said:

> "Complainant insists that Section 4 discriminates between *citizens* of Tennessee and those of other states requiring the latter to pay a tax of one hundred dollars for the privilege of doing railroad construction business here, while *citizens* of this State are required to pay only twenty-five dollars, hence that the section is in conflict with *Art. IV, Sec. 2, Sub-sec. 1*, of the Federal Constitution, and also with the *fourteenth amendment* to the same instrument. In our judgment the construction suggested is not a sound one."
>
> See Transcript of Record, p. 137.

As to how the insistence was made does not appear. No petition to rehear was filed in the State Supreme Court.

The assignments of error now relied on by plaintiff in error for a reversal, present another and different question. The first assignment attacks the validity of the tax statute in question:

> "Because said above provisions of the Revenue Act of 1909 fixing a privilege tax against persons, firms and corporations for engaging in and carrying on a construction business is unconstitutional and void in that there is a discrimination against *non-residents* of Tennessee in that a tax of $100.00 is levied against *non-resident persons, firms and corporations, not having* their *chief office* in Tennessee, while a tax of only twenty-five dollars is levied against *residents* of Tennessee, and persons, firms and corporations having their chief office in Tennessee, and thereby abridges the privileges and immunities of citizens of the United States *not residents* of Tennessee, and denies to citizens of the United States not citizens of Tennessee the equal protection of the law."
>
> See Transcript of Record, p. 146.

And the second assignment assails a portion of the statute on the ground that the same:

> "Is unconstitutional and void in that it discriminates against *non-residents* of Tennessee and in favor of *residents* of Tennessee, by imposing a tax of $100.00 against *non-resident* persons, firms and corporations doing a construction business in Tennessee, while by the next section of said Act a tax of only $25.00 is imposed upon *resident* persons, firms and corporations doing a construction business in Tennessee, thereby violating the provisions of Article IV, Section 2, of the Constitution of the United

States, and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States."

See Transcript of Record, p. 147.

THE TAX STATUTE IN QUESTION.

The provisions of the State statute attacked by plaintiff in error reads as follows:

> "Each foreign construction company, with its chief office outside of this State, operating or doing business in this State, directly or by agent, or by any subletting contract, each, per annum in each county ----------$100.00
>
> "Each domestic construction company and each foreign construction company, having its chief office in this State, doing business in this State, each, per annum, in each county ----------$25.00
>
> "The above tax shall be paid by persons, firms, or corporations engaged in the business of constructing bridges, waterworks, railroads, street paving construction work, or other work, or structure of a public nature."
>
> See Transcript of Record, p. 136.

The statute requires the tax to be paid as a condition of the issuance of a license.

The opinion of the State Supreme Court construing the statute is as follows:

> "Complainant insists that Section 4 discriminates between citizens of Tennessee and those of other states requiring the latter to pay a tax of one hundred dollars for the privilege of doing railroad construction business here, while citizens of this State are required to pay only twenty-five dollars, hence

that the section is in conflict with *Art. IV., Sec. 2, Sub.sec. 1*, of the Federal Constitution, and also with the *fourteenth amendment* to the same instrument. In our judgment the construction *suggested* is not a sound one. The determining feature in the legislation quoted is the having of one's chief office in this State. Any citizen of this State, as well as any citizen of a foreign State, who has his chief office out of the State, must pay the one hundred dollars tax; so if any domestic corporation, as well as foreign corporation, having its chief office out of the State. Any foreign corporation or citizen of another State, or firm, as well as domestic corporations, citizens of this State, and firms of this State having its or their chief office in this State, are all alike entitled to carry on a railroad construction business here on the payment of twenty-five dollars. There is no discrimination at all."

See Transcript of Record, p. 137.

That part of the opinion of the State Court which holds that Wright took out a license too late is as follows:

"It is not denied that complainant failed to pay the tax before he did the work. After the work was performed and before suit—brought he paid the twenty-five dollar tax. This was too late, even if he had paid the one hundred dollars, the tax applicable to his situation, he being a citizen of Alabama with his chief office there. It was too late because payment of a privilege tax and procurement of a license after the privilege has been exercised, though before suit—brought, will not give the party so paying any right to maintain suit. *Saule vs. Ryan*, 53 S. W., (Tenn.) 977. The complainant having acted in violation of a statute in undertaking and transacting the business can not recover. *Stevenson v. Ewing*, 3

Pick., (87 Tenn.), 46; *Pile vs. Carpenter*, 118 Tenn., 288.

See Transcript of Record, p. 137.

It will be noted that the State Supreme Court did not hold that the license procured by said Wright would not have been sufficient if procured in time. It was held only that he procured it too late.

BRIEF AND ARGUMENT.

The First Assignment of Error is in substance that the State Supreme Court erred in dismissing the complainant's suit, and in adjudging that J. W. Wright, Jr. was liable for a privilege tax for engaging in the railroad construction business in Tennessee, because Section 4 of the Revenue Law of Tennessee is unconstitutional and void in that it discriminates against *non-residents* by levying a tax of $100.00 per annum against *non-resident* persons, firms and corporations not having their chief office in said State, while a tax of only $25.00 is required of resident persons, firms and corporations having their chief office in said State, and thereby abridges the privileges and immunities of citizens of the United States not residents of Tennessee, and denies citizens of the United States the equal protection of the laws.

Section 4 of the Tennessee Revenue Law assailed, does not bear the construction contended for by counsel for plaintiff in error. Such a construction was expressly rejected by the Tennessee Supreme Court.

The questions presented by each of the assignments of error filed in behalf of plaintiff in error appear to be

made in this Court for the first time. Upon reading the opinion of the State Supreme Court, the inference is drawn that complainant *insisted* in that Court that the statute in question discriminated between *citizens* of Tennessee, and those of other states, in that *citizens* of other states are required to pay a tax of one hundred dollars for doing railroad construction work while citizens of Tennessee are required to pay only twenty-five dollars.

The contention now made by the first and second assignments is that the said statute discriminates between *residents* and *non-residents*.

The assignments of error, if any, filed in behalf of plaintiff in error in the State Supreme Court, are not in the record. No petition to rehear was filed, hence, the point was not made in the State Supreme Court that the statute *as construed* by said Court was unsound, or that it abridged the privileges and immunities of J. W. Wright, Jr., or denied him the equal protection of the laws. Nor is there any assignment here that the State Supreme Court erred in its construction of the statute in question.

Error not assigned on appeal to the State Court will not be considered by the Federal Supreme Court.

Bullen v. Wisconsin, 240 U. S. 625; 60 L. Ed. 830.

By the assignments of error the contention now made in behalf of plaintiff in error is not that the statute, *as construed* by the highest Court of the State, discriminates

against citizens or residents of other states, but the insistence is that the statute *as construed* by counsel for plaintiff in error discriminates against residents of other states. In other words, counsel seek to have the Federal Supreme Court ignore the construction placed upon the statute by the State Court, and to give it such a construction as will render it discriminatory.

The State Supreme Court, with reference to the insistence made in that Court, expressly held that the construction suggested by the plaintiff in error was not sound, and repudiated it; and the Court then construed the statute as applying uniformly and alike to all persons, firms and corporations, regardless of residence or citizenship.

Learned counsel for plaintiff in error on pages 19 and 20 of their brief, apparently concede that the construction placed upon the statute by the State Court removes the so-called discriminatory feature, but they contend that the construction was not warranted and that the State Court did not have authority to "construe away a plain discrimination." In this contention, counsel for plaintiff in error have revealed an error or misapprehension which goes to the root of their entire argument, as well as their assignments of error, as they assume that the construction of the State Statute by the State Court may be ignored altogether.

It is the rule of the Supreme Court of the United States to adopt as correct the construction given a statute by the highest Court of the State, and not a contrary con-

struction contended by counsel. Nor will the Federal Supreme Court give to a statute a significance which the State Court has decided it does not have.

Forsythe v. Hammond, 166 U. S. 504; 41 L. Ed. 1095.
Wade v. Travis County, 174 U. S. 499; 43 L. Ed. 1060.
Flannigan v. Sierra County, 196 U. S. 553; 49 L. Ed. 597.
Price v. Illinois, 238 U. S. 446; 59 L. Ed. 1400, 1405.
Orr v. Allen, ------ U. S. ------, Decided December 9, 1918.
American Steel & Wire Co. v. Speed, 192 U. S. 500; 48 L. Ed. 538.

In the latter case, Mr. Justice White (now Chief Justice) said:

> "Construing the taxing statutes of the State, the Court below decided in this case that they equally apply to all merchants, and hence did not discriminate as against any member of the merchants' class. The argument is made that under the facts found by the Court below it was erroneously held that the steel company, because of the business which it carried on in the State of Tennessee, was a merchant within the statutes, and the power to review this question, it is insisted, would be exerted because the question is Federal in its nature. The contention is without merit. As the levy of the merchants' tax violated no Federal right, the mere determination of who were merchants within the State law involved no Federal question. The construction of the State law being conclusive and embracing all persons doing a like business with the steel company, it follows that there was no discrimination. Conceding it to

be true, as argued, that in the past there would seem to have been conflict of opinion in the Court of Tennessee in interpreting various statutes concerning the merchants' tax, this contrariety does not concern the meaning of the statute construed in this case. As this statute has been construed by the State Court as applying to all merchants and as embracing alike all persons engaged in the character of business which the steel company was carrying on, it follows that there is no ground upon which to predicate the complaint of undue discrimination."

American Steel & Wire Co. v. Speed, 192 U. S. 500; 48 L. Ed. U. S., 547-548.

See also *Cargill v. Minn.*, 180 U. S. 452; 45 L. Ed. 619.

We do not believe it will be seriously insisted that the statute as construed by the State Court discriminates against citizens or residents of other states, since the determining feature is the location of a *chief office*, and not the question of residence or citizenship. The Act applies alike to residents and non-residents; to citizens of Tennessee as well as to citizens of other states. To argue that few non-resident persons, firms or corporations have their chief office in Tennessee, or that few persons, firms or corporations resident in Tennessee have their chief office in some other State, does not prove discrimination. It is a fact of common knowledge that great numbers of persons, firms and corporations have their chief office in states, other than the State in which they reside, or are domiciled. For illustration we refer to the great number of citizens of New Jersey and other states who have their chief offices in New York. It has

never been held, and possibly never before contended, that "chief office" and citizenship are synonymous.

Providing that the amount of the privilege tax shall be regulated with reference to the location of the chief office of the person, firm, or corporation engaged in constructing works of a public nature, does not conflict with any provision of the Federal Constitution. A recent case in point is that of *Armour & Company v. Virginia*, 246 U. S. 3-5; 62 L. Ed. 547. In that case it was held in the opinion delivered by Mr. Chief Justice White that a State statute imposing an annual license fee upon all persons carrying on a merchandise business, the amount of which is determined by the sum of the merchant's purchases during the year, is not, because of its exclusion of manufacturers taxed on capital by the State, who offer for sale merchandise at the *place of manufacture*, repugnant to the Federal Constitution. In other words, the determining feature in that case is the having of one's manufacturing plant located in the State of Virginia.

> See *Armour & Company v. Virginia*, 246 U. S. 3-5; 62 L. Ed. 547.

We submit that if it is competent for the legislature to exempt from the payment of a privilege tax, persons, firms and corporations having their *manufacturing plant* where goods are offered for sale located *within the State*, and yet impose the tax on those merchants who have their *place of manufacture* in *another State*, manifestly it is competent for the legislature, for a stronger reasons, to provide a different privilege tax upon persons,

firms and corporations having their *chief office within the State,* from those having their *chief office without the State.* It is not discrimination but is treating all alike under the same circumstances.

In the opinion of the Federal Supreme Court in the case of *Armour & Company v. Virginia,* the substance of the holding of the State Court in that case is stated as follows:

> "It was held that the statute was inherently within the State legislative power, and that the difference between a manufacturer selling goods by him made at the place where they were manufactured and one engaged in a mercantile business, even if his business consisted in whole or in part of the selling of goods by him manufactured at a place other than the place of manufacture, was such as to afford adequate ground for their distinct classification, and hence justified the provision of the statute including one in the merchant's license and excluding the other. In addition construing the statute, it was decided that it was not discriminatory, since the exclusion from the license tax of manufacturers selling at their place of manufacture was open to all, whether non-citizens or even non-residents who manufactured in Virginia, and because the liability for the merchant's license embraced even those who manufactured in Virginia if they sold as merchants the goods by them manufactured at a place other than the place of manufacture. From this latter conclusion it was decided that if any disadvantage resulted to the person selling as a merchant in Virginia goods manufactured by him in another State by subjecting him to a license when such license did not include the manufacturer selling in Virginia at the place of

manufacture, the disadvantage was a mere indirect consequence of a lawful and non-discriminatory exercise of State authority and afforded no basis for holding the statute to be repugnant to the clauses of the Constitution of the United States, as contended. 118 Va. 242, 87 S. E. 610."

Armour & Co. v. Virginia, 246 U. S. 3-5; 62 L. Ed. U. S., 549-550.

And in passing upon the contentions raised by the assignments of error, this Honorable Court said:

"In the first place, we are of opinion that the distinction upon which the classification in the statute rests between a manufacturer selling goods by him made at their place of manufacture and one engaged as a merchant in whole or in part in selling goods of his manufacture at a place of business other than where they were made is so obvious as to require nothing but a mere statement of the two classes. All questions concerning the equal protection clause of the 14th Amendment may therefore be put out of view.

* * * * * * * * *

"In the third place, we also conclude that, as the subject-matter of the statute was plainly within the legislative authority of the State, and as the previous conclusions exclude the conception of the repugnance of the statute to the provisions of the Constitution, just considered, it necessarily follows that there is no ground for the assertion that the statute conflicted with the privileges and immunities clause of Article 4 of the Constitution, or of the clause in the 14th Amendment providing that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.'"

Armour & Co. v. Virginia, 62 L. Ed. U. S., 550.

Another case in point is Peyman Brewing Co. v. Brister 179 U.S. 445; 45 L. Ed. 2

Let it be kept in mind that no question of interfering with or burdening interstate commerce is involved. J. W. Wright was not engaged in handling commerce in any sense. While in Tennessee he was engaged in constructing a public work—the line of a common carrier—an enterprise in which the State and the public had an interest and concern. The State tax in question was made applicable to all persons engaged in construction work "of a public nature." The statute contains this language: "The above tax shall be paid by persons, firms or corporations engaged in the business of constructing *bridges, waterworks, railroads, street paving construction work,* or *other work or structure* of a *public nature.*"

See Transcript of Record, p. 136.

RESIDENCE AND CITIZENSHIP DISTINGUISHED.

If the contention were sound that the construction of the statute by the State Court is not controlling, and that the statute requires a higher privilege tax of a non-resident than of a resident, would this render the statute repugnant to the constitutional provisions invoked? We submit that it would not.

Residence and citizenship are not synonymous. The 14th Amendment refers to such privileges and immunities as pertain to citizenship of the United States as distinguished from State citizenship.

Slaughter House Cases, 83 U. S. 36—130; 21 L. Ed. 394.

La Tourette v. McMaster, Decided by U. S. Supreme Court January 20, 1919.

In the last named case, there was involved the constitutionality of a statute of South Carolina providing that only such persons may be licensed as insurance brokers as are residents of the State and have been licensed insurance agents of the State for at least two years. The insistence was made that said statute violated Section 2 of Article 4 and the 14th Amendment of the Constitution of the United States, in that a citizen of New York was denied the privileges and immunities granted to citizens of the State of South Carolina.

This contention was overruled in the opinion of the United States Supreme Court delivered by Mr. Justice McKenna. The decision of this Honorable Court sustaining the South Carolina statute is put upon two grounds: (1) The fact that insurance business is clothed with a public interest and therefore subject to the regulating power of the State and (2) The State Court in its construction of the statute clearly drew the distinction between "citizens" and "residents"; and in conclusion the Court said:

> "The Court thus distinguishes between citizens and residents and decides that it is the purpose of the statute to do so, and, by doing so, it avoids discrimination. In other words, it is the effect of the statute that its requirement applies as well to citizens of the State of South Carolina as to citizens of other states, residence and citizenship being different things."

La Tourette v. McMaster, U. S. Supreme Court, L. C. P. Co. Advance Opinions, February 15, 1919, page 199.

The Constitution does not forbid every discrimination by a State against residents of another State, or the according to its own residents more favorable conditions in the pursuit of business not affecting commerce. As said by Mr. Justice Harlan in *Blake v. McClung*:

> "The Constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one State in a condition of alienage when he is within or when he removes to another State, or when asserting in another State the rights that commonly appertain to those who are part of the political community known as the people of the United States, by and for whom the Government of the Union was ordained and established."
>
> *Blake v. McClung*, 172 U. S. 256; 43 L. Ed. 439.

State statutes incidentally and even directly discriminatory against non-residents are not uncommon, as pointed out by Justice Harlan in the last mentioned case. We refer to statutes requiring non-residents who sue in State Courts to file cost bonds, while residents may sue without giving cost bonds; statutes permitting attachments of property of non-residents on the ground of residence alone, while such attachments are not allowed as to property of residents; statutes forbidding non-residents to hunt game or fish within a State, while according the privilege to residents. Some of the illustrative cases on

this form of permissible statutory discrimination, or more properly, classification, are as follows:

Taxing emigrant agents engaged in the business of employing persons to labor outside the State.

Williams v. Fears, 179 U. S. 270; 45 L. Ed. 186.

Confining license to engage in the business of constructing lightning rods to residents only, and excluding non-residents from said business.

State of New Hampshire v. Stevens, 99 Atl. 723; L. R. A. 1917 C, 528.

Confining license of auctioneers to resident voters of a county.

Wright v. May, 127 Minn. 150, L. R. A. 1915 B, 151.

Confining license of peddlers to residents of the State.

Commonwealth v. Hana, (Mass.) 81 N. E. 149; 11 L. R. A. (N. S.) 799; 122 Am. St. Rep., 251.

Confining license of insurance brokers to residents.

La Tourett v. McMaster, supra.

Discriminating against non-resident physicians.

Watson v. Maryland, 218 U. S. 173; 54 L. Ed. 987.

The cases of *Commonwealth v. Hana, supra*, was cited with approval in *Patsone v. Pa.*, 232 U. S. 138; 58 L. Ed. 539, in which it was held that a statute of Pennsylvania making it unlawful for unnaturalized foreign born residents to kill wild game except in defense of person or

property, would not violate the Federal Constitution. Mr. Justice Holmes, after stating the right of the State to classify for the purpose of regulation, said:

> "The question, therefore, narrows itself to whether this Court can say that the legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized agents were the peculiar source of evil that it desired to prevent. * * * Obviously the question so stated is one of local experience on which this Court should be very slow to declare that the State Legislature was wrong in its facts. * * * It is enough that this Court has no such knowledge of local conditions as to be able to say that it was manifestly wrong."
> 232 U. S. 138; 58 L. Ed. (U. S.) 539.

STATE POWER TO CLASSIFY OCCUPATIONS.

The Tennessee statute attacked by the plaintiff in error in this case can be treated and sustained as a tax measure, and also under the police power as regulating a business. Under both the taxing power and the police power, the State was fully empowered to classify persons, firms and corporations engaged in building railroads, bridges, streets and other public works. That the State Legislature had the power to classify construction companies with respect to the location of their chief office is beyond dispute. If the classification can be sustained under either the taxing power or the police power, the Federal Supreme Court will not strike it down as being repugnant to the Federal Constitution.

We submit that there are ample grounds to sustain the classification, making a distinction between persons, firms, and corporations having their chief office within the State and those having their chief office without the State. As stated, the classification may be made for the purposes of taxation and regulation, hence, the only inquiry in this Honorable Court would be as to whether the classification is so palpably arbitrary and unfounded as to overcome the presumption that the State Legislature found the conditions or circumstances to exist which warranted the classification made.

It is perhaps of common knowledge that the business of constructing railroads, bridges and other like public works is peculiar. Ordinarily such construction concerns have and should have the chief office, or a chief office, at or near the work of construction. Usually such contracts involve large sums, and many laborers and many sub-contractors are employed or engaged on the work. Generally the common labor employed consists of foreigners, such as Hungarians, Chinese and Japanese. The State and the public have an interest and concern in the proper performance of such work, as the public service is involved, and the right of eminent domain is given. It may be deemed important to the proper performance of such work that the chief office be located at or near the work. As indicated in the case at bar, the complainant, J. W. Wright, Jr., neglected his work and breached his contract, as found by the jury, and his bill shows that he failed to settle with his sub-contractors.

It is a matter of common knowledge that those undertaking contracts for constructing extensive works of a public nature, such as railroads, frequently fail and become bankrupt, due either to mistake, fraud, lack of operating capital, or changes in labor or financial conditions. In practically all such cases, the rights and claims of laborers, sub-contractors and furnishers of supplies and materials are vitally affected, and it is important and vital that they have a remedy by suit and a personal judgment as well as by attachment and garnishment, which they probably would not have except when the chief office of the principal contractor is within the State.

The State is further justified in making a distinction in the amount of privilege tax based upon whether the chief office of the Construction Company engaged on work of a public nature is located within the State, or without the State, for the reason that such concern having a chief office within the State would likely be liable for and pay ad valorem taxes as well as the privilege tax; it would likely have funds on deposit within the State, also subject to taxation; it would likely have contracts, securities and other property within the State at its chief office subject to State taxation; it would, under the laws of Tennessee, be subject to suit and service of process and personal judgment in said State, which would not be the case if there were no chief office in the State; and it would be subject to garnishment in the State as to sums due to sub-contractors and laborers, and would have there its books of account and other documents and papers within the jurisdiction of the State Courts, and subject to subpoena duces tecum. Furthermore, it is

more difficult to collect the privilege tax from those having their chief office out of the State. In many instances they do as Wright did—come or send their forces into the State and engage in the work without procuring a license, unless they are discovered by the State officers. With those having a chief office in the State, it is different.

There is a broad distinction between a construction company, (a corporation, firm or individual) which has its chief office in another and perhaps a distant State, and which makes only an occasional and temporary incursion into another State for the purpose of assuming a contract and performing work of a public nature, and one which is permanently located there, or at least has its chief office there during the progress of the work, and subject to the jurisdiction of the State Courts.

The first may have no property, or agent, or agency within the State, no person upon whom process may be served, pay no taxes there, and the State be without means or opportunity to investigate or regulate his business, while in the second case entirely different circumstances and conditions exist. And further, the contractor who has his chief office within the State is less likely to abandon the work before it is completed.

The complainant, J. W. Wright, Jr., was engaged in the exclusive business of constructing railroads. A railroad is a quasi-public enterprise in the construction of which a State is concerned. Railroads are common carriers, and in a sense, natural monopolies; they have and exer-

cise the right to intersect and occupy streets and highways, cross streams, build bridges, appropriate rights of way by the exercise of the right of eminent domain, transport persons and freight, and to charge and collect reasonable rates therefor. The State has or should have the right to say who shall construct its railroads and other works of a public nature, and may confine its license to do so to residents of the State to the exclusion of non-residents and foreigners, without violating any constitutional limitation. The right to build railroads not being one of the privileges or immunities of citizens as such, the denial or abridgement of that right does not conflict with the 14th Amendment of the Federal Constitution.

This Honorable Court has recently held that the privileges and immunities of the citizens of the several states are not abridged, contrary to the United States Constitution, Art. 4, Sec. 2, by the New York law that only citizens of the United States may be employed in the construction of public works, and that in such employment citizens of the State of New York must be given preference.

Heim v. McCall, 239 U. S., 175; 36 Sup. Ct. Rep. 78; 60 L. Ed., 206.

"The inhibition that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discrimination and hostile legislation."

McPherson v. Bleacher, 146 U. S. 1; 36 L. Ed. (U S.) 869, 878.

It should be noted that the Act complained of does not arbitrarily prohibit anyone from pursuing in the State of Tennessee the business of constructing railroads. It only requires that persons so engaged take out license and that those who have their chief office in the State pay the privilege tax of $25.00 and those having their chief office out of the State pay the privilege tax of $100.00. It applies to every one without discrimination

It is usual and common for the State Legislatures to graduate the amount of a privilege or occupation tax according to the location of the office, factory, warehouse, elevator, laundry, theater, etc. Would anyone seriously contend that a State law is unconstitutional which requires contractors on railroads, streets and other works of a public nature, with their chief office located in counties of less than fifty thousand population, to pay an occupation tax of $25.00 per annum, and those having their chief office in counties of over fifty thousand population, as well as those having their chief office out of the State, to pay $100.00? Under such a law could a contractor, having his chief office in another State, reasonably contend that, he being a non-resident, is discriminated against because he is not allowed to carry on his business in counties under fifty thousand population by paying the tax of only $25.00 per annum? As such a law would apply to residents and non-residents alike, could any non-resident, so situated, maintain that he was denied the equal protection of the laws, or that he was not accorded the privileges and immunities of citizens? The statute involved in the case at bar does not differ in principle. As every non-resident has the privilege of establishing

a chief office in Tennessee equally with residents, how can any such non-resident justly claim discrimination?

We submit that it is not a sound contention that persons, firms and corporations, resident in Alabama, with no chief office in Tennessee, and paying no taxes in the latter State, and not subject to the jurisdiction thereof, should be permitted to send laborers of every description into Tennessee and there engage in the construction of works of a public nature in competition with residents of the said State or those having a chief office there, and subject to its jurisdiction and who pay taxes therein, and yet insist that the State of Tennessee has not the power to make a difference in the amount of the occupation tax based upon the location of the chief office. The difference in the amount of the tax is an inducement to all persons, firms and corporations, resident and non-resident, to locate an office in Tennessee, if they desire to engage in constructing works of a public nature in said State. Persons, firms and corporations permanently located in Tennessee and having their chief office there, where they are subject to taxation, regulation and jurisdiction of the said State, may be classified and taxed differently from those who have their permanent chief office in another State from which they undertake to direct railroad construction work in Tennessee.

Wright actually pursued said occupation in the State without molestation. He cannot, therefore, complain that he was deprived of the right of pursuing an occupation or calling. He was confronted only with the proposition that, not having procured a license until it was too

late, as held by the Supreme Court, his contract was unenforcible. And it will further be noted that a license was issued to him upon payment of the $25.00 tax, so that he could not be heard to say that he was discriminated against by being refused the license until he paid the $100.00 tax. The State Court did not hold that a license procured by Wright upon the payment of the $25.00 tax did not protect him or authorize him to carry on said business in Tennessee, it only held that the taking out of the license and payment of the tax was too late under the State authorities.

THE STATUTE AS CONSTRUED NOT REPUGNANT TO FEDERAL CONSTITUTION.

But even if it could be said that Wright was in position to raise the question as to the constitutionality of the State law requiring the taking out of license and payment of privilege tax as construed by the State Supreme Court, it is entirely manifest that the Tennessee Legislature was acting within its rights in enacting the law and that same does not violate any provision of the Federal Constitution, especially upon any reason or ground relied on in the assignments of error.

As heretofore pointed out, the business or occupation of constructing railroads is not one of the privileges and immunities of the citizens of the United States, and the classification of occupations for the purpose of taxation or regulation is not prohibited by the 14th Amendment. Discrimination in this respect is only apparent and incidental and not inhibited by the Federal Constitution. The

14th Amendment does not require that taxation be absolutely equal and uniform nor that there be absolute symmetry, nor does it forbid reasonable and appropriate classification, to be determined by the State Legislature with reference to the peculiar conditions existing in the State.

> "The Federal Constitution does not prohibit a State from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal laws."
>
> *Central Lbr. Co. v. S. Dakota*, 226 U. S. 157; 57 L. Ed. (U. S.), 169.

In *Hayes v. Missouri*, 120 U. S., 68; 30 L. Ed. 578, Mr. Justice Fields, speaking for the Court, said:

> "The 14th Amendment to the Constitution of the United States does not prohibit the legislature full limit either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in the privilege and in the liabilities imposed. As we said, in speaking of the 14th Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited,' but legislation which carrying out a public purpose, is limited in its application, if within the sphere of its application it affects alike all persons similarly situated, is not within the amendment."
>
> See also *Barbier v. Connolly*, 113 U. S., 27; 78 L. Ed. 923.

The Federal Constitution imposes no restraints on the State in regard to unequal taxation.

Davidson v. New Orleans, 96 U. S., 97; 24 L. Ed. 616.

Cited on this point in *Magoun v. Illinois Trust Co.*, 170 U. S. 295; 42 L. Ed. 1043.

The range of the State power was expressed by Mr. Justice Bradley as follows:

> "It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rate of taxation upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. On such regulations and those of like character, so long as they proceed within reasonable limits and general usage are within the discretion of the State Legislature, or the people of the State in framing their constitution."

Bells Gap R. R. Co. v. Pa., 134 U. S., 232; 33 L. Ed. 892.

Magoun v. Ill. Tr. & Savings Bank, 170 U. S., 293 295; 42 L. Ed. 1037-1043.

In the case of *Magoun v. Illinois Trust & Savings Bank, supra*, it is said:

> "And if the constituents of each class are affected alike the rules of equality prescribed by the cases is satisfied. In other words, the law operated 'equally and uniformly upon all persons in the same circumstances.'"
>
> 170 U. S., 296.

That the Constitution of the United States authorizes the legislatures of the several states to classify occupation for the purposes of taxation or regulation, see the decisions in the following cases: *Southwestern Oil Company v. Texas*, 217 U. S. 114, 54 L. Ed. 692; *Watson v. Maryland*, 218 U. S. 173, 54 L. Ed. (U. S.) 987; *Williams v. Ark.*, 217 U. S. 79, 54 L. Ed. (U. S.) 673; *Cargill Co. v. Minn., ex rel*, 180 U. S. 452, 465, 45 L. Ed. 619, 626.

That the State has the right to classify its subjects for the purpose of taxation, or for regulation in the exercise of its police powers cannot now be questioned. Such contentions have long since been foreclosed by the decisions of the Supreme Court of the United States. The power of classification "must have a wide range of discrimination." It is not reviewable unless "palpably arbitrary."

Purity Extract & T. Co. v. Lynch, 226 U. S. 192; 57 L. Ed. 184.

Patsone v. Pa., 232 U. S., 138; 58 L. Ed. 539.

Magoun v. Ill. T. & S. Bank, 170 U. S. 282; 42 L. Ed. 1037.

The purpose and necessity of a classification will not be questioned by the Federal Supreme Court.

Adams v. Milwaukee, 228 U. S. 572; 57 L. Ed. (U. S.) 976.

McGoun v. Ill. Tr. & Savings Bank, 170 U. S., 283; 42 L. Ed. 1037, 1042 and 1043.

Southwestern Oil Co. v. Texas, 217 U. S., 114; 54 L. Ed. (U. S.) 688.

As said by the United States Supreme Court:

> "If any state of facts reasonably can be conceived that would sustain it (the law called in question as to classification) the existence of that state of facts at the time the law was enacted must be assumed. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."
>
> *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S., 76-78; 55 L. Ed. (U. S.) 377.

And again:

> "Every presumption must be indulged in favor of the constitutionality of the legislation."
>
> *Bradley vs. Richmond*, 227 U. S., 477, 483; 57 L. Ed. 605.
>
> *Toyota vs. Haiwaii*, 226 U. S., 190; 57 L. Ed. 181.

And if the State Legislature should see fit to make a distinction between those persons who come into the State for permanently engaging in business therein, and those making transitory incursions into the business, there can be no valid objection.

> *Cent. Lbr. Co. v. S. Dakota*, 226 U. S., 157; 57 L. Ed. 164.

And again:

> "Regulations regarding the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, * * * and are questions for the State to determine * * * and unless the regulations are so utterly unreasonable

and extravagant in their nature and purpose, etc., * * * they do not extend beyond the power or the State to pass."

Grundling v. Chicago, 177 U. S. 183; 44 L. Ed. (U. S.) 725.

Williams v. Ark., 217 U. S. 79; 54 L. Ed. (U. S.) 667.

Brown-Forman Co. v. Ky., 217 U. S. 563; 54 L. Ed. (U. S.) 886-887-888.

And again:

"The legislature being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a Court may disagree with the legislature in its view of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

McLean v. Ark., 211 U. S. 539, 545-547; 53 L. Ed. 315 and 319.

The Supreme Court is very reluctant to oppose its opinion on classification, or the justice of it, to that of the State Legislature, "informed no doubt by experience, of conditions, and fortified by presumption of legality, and confirmed, besides, by the opinion of the Supreme Court of the State" * * * "The legislature cannot be judged by abstract or theoretical comparisons. It must be presumed that it was induced by actual experience" * * * "We have said many times that the crudities or even injustice of State laws are not redressed by the 14th Amendment."

Chicago Dock & Canal Co. v. Fraley, 228 U. S. 684, 687; 57 L. Ed. (U. S.), 1024.

In the case of *Toyota v. Hawaii, supra*, it was held that the discriminations between the District of Honolulu and other districts in the amount of the fee imposed for a license to make sales at auction, which is $600.00 for the District of Honolulu, and $15.00 for each other district, is not so arbitrary or unreasonable as to render the statute unconstitutional. And Mr. Justice Hughes rendering the opinion of the Court, repeated that the Court could not say that there was no reasonable basis for the classification; that it must be presumed the legislature, in exercising its province to fix the amount of the fees, took into account the varying conditions; that the power of classification "must have a wide range of discretion," and "is not reviewable unless 'palpably arbitrary.'"

Id. 226 U. S. 191, 192.

In the case of *Bradley v. Richmond, supra*, the legality of the classification and privilege tax required of bankers was involved. There appeared to have been thirteen classes created, but the statute was upheld. Mr. Justice Lurton in delivering the opinion of the Court, said:

> "The tax imposed is not merely an exercise of the police power regulating a business, but is a tax assessed as a condition upon which the license issues. Though it fulfils the double function of both regulating the business and producing revenue, it was fully authorized by the law of the State, as adjudged by the very judgment under review. *Gundling v. Chicago*, 177 U. S. 183, 189, 44 L. Ed. 725, 729, 20

Sup. Ct. Rep. 633. Since the purpose of the statute is double, it is plain that to exact the same amount from each person or firm subject to the tax might result in inequality of burden under like circumstances and conditions. Therefore it was that the ordinance provided for a division into classes, those in each class paying the same tax.

Id. 227 U. S. 480, 57 L. Ed. 605.

In the case of *Cargill v. Minn. ex rel. R. R. Com,* 180 U. S. 452; 45 L. Ed. 619, a law of Minnesota regulating and classifying elevators was involved, and it was held that the requirement of a license for warehouses and elevators located on a railroad right of way, or other railroad property, does not violate the 14th Amendment, although a license is not required of elevators and warehouses differently situated. And this case is also authority on the point that the construction of a State statute by a State Court is to be accepted by the Federal Court in determining whether the statute violates the Federal Constitution. Id. 180 U. S. 452; 45 L. Ed. 619.

The case of *Southwestern Oil Co. v. Texas, supra,* involved the constitutionality of a State statute imposing an occupation tax on wholesale dealers in oil, without exacting such a tax from retail dealers in oil, or from wholesale dealers in other articles. The law was upheld and in the opinion of the United States Supreme Court it was said:

"If it be within the power of the legislature to enact the statute, then arbitrariness cannot be predicated of it in a Court of law. And it cannot be held to be beyond legislative power simply be-

cause of its classification of occupations. What were the special reasons or motives inducing the State to adopt the classification of which the Oil Company complains, we do not certainly know Nor is it important that we should certainly know. It may be that the main purpose of the State was to encourage retail dealing in the particular articles mentioned in Sec. 9. If the statute had its origin in such a view, we do not perceive that this Court can deny the power of the State to proceed on that ground. We may repeat what was said in Delaware Railroad Tax, 18 Wall. 206, 231, 21 L. Ed. 888, 896, that 'It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.' But we will not speculate as to the motives of the State, and will assume—the statute, neither upon its face nor by its necessary operation, not suggesting a contrary assumption—that the State has in good faith sought, by its legislation, to protect or promote the interests of its people. It is sufficient for the disposition of this case to say that, except as restrained by its own Constitution or by the Constitution of the United States, the State of Texas, by its legislature, has full power to prescribe any system of taxation which, in its judgment, is best or necessary for its people and government; that, so far as the power of the United States is concerned, the State has the right, by any rule it deems proper, to classify persons or businesses for the purposes of taxation, subject to the condition that such classification shall not be in violation of the Constitution of the United States."

Id. 217 U. S. 127; 54 L. Ed. 694.

CLAIMS OF DISCRIMINATION NOT WELL FOUNDED.

The State Court did not yield to the contention of the complainant that the paragraph of Section 4 of the State Law requiring the tax of $100.00 was unconstitutional and rendered the whole Act void, nor will the Federal Court so declare. The United States Supreme Court will not declare the whole Act void even if it should hold that the clause levying the $100.00 tax is unconstitutional and void. So that in any event J. W. Wright, Jr., was liable for the $25.00 tax, as he confessed himself to be by applying for and taking out a license upon the payment of said amount, though too late to give him a standing in the Courts of Tennessee.

As Wright was permitted to carry on the business of constructing a railroad in the State of Tennessee, and was ultimately issued a license, purporting to cover the period of his work upon the payment of the $25 00 tax only, and he is now denied a recovery because he took out the license too late, it is manifest that there was no discrimination as to him in any event. Since he was never called upon or required to pay the $100.00 tax, and the decree of the State Supreme Court denying him recovery in this case was not based solely upon the fact that he did not pay the $100.00 tax, the decree of the State Court may be rested alone upon the point that he took out a license too late. It is therefore manifest that the contention now made by the plaintiff in error in his assignments of error is not so much that Wright was discriminated against, insofar as the $100.00 tax was concerned,

but would have the Court make a discrimination in Wright's favor by so construing the law as to hold that he was immune from any tax and entitled to carry on a construction business in Tennessee on more favorable terms than were accorded to all other persons within the State.

In view of the fact that there was no finding by the jury that J. W. Wright, Jr. was a non-resident of Tennessee, and there being no authoritative finding of the State Supreme Court that said Wright was a non-resident of Tennessee, and the judgment of the Supreme Court not being based upon the claim that he was a non-resident, but it appearing that Wright voluntarily took out a license and paid the smaller tax, and thereby estopped himself from claiming the status of a construction company having a chief office without the State, and there being no holding of the State Court to the effect that the license actually taken out by Wright and the payment of the smaller tax would not have been sufficient had it been paid in time; but it appearing that the judgment of the State Supreme Court may be founded alone upon the fact that the tax was paid and the license taken out too late, we submit the assignment of error to the effect that the paragraph of the statute imposing the $100.00 tax discriminates against non-residents, is lacking in substance and raises no Federal question, at least none that Wrgiht's administrator can complain of.

The decision on the Federal question was unnecessary for the reason that the complainant, J. W. Wright, Jr., admitted his liability for the $25.00 tax by voluntarily

paying same and taking out a license, but the State Supreme Court held that he was too late. Reference is made to the holding of the Court on this point, which is copied at page __ of this brief. What the Court said about Wright being a citizen of Alabama with his chief office there, was a mere casual or parenthetical remark or dictum, and unnecessary to its decision.

Wright was liable for the tax at one rate or the other. He could not be heard to say that because he was a non-resident he could do a railroad construction business in Tennessee without taking out a license or paying a privilege tax as residents were required to do. He could not, with reason, insist upon a construction that would be a discrimination in his favor and against residents. If he had taken out the license and have paid the $25.00 tax before entering into the contract with the Jackson Construction Company, he would have had a standing in Court. The Tennessee State Courts have held that if a license is issued to a taxpayer, or one exercising a privilege, his contracts made thereafter may be enforced in Court although the incorrect amount of privilege tax was paid.

REPLY TO SECOND ASSIGNMENT.

The second assignment of error is substantially the same as the first assignment, and does not appear to have been made in the State Court, but is made here for the first time. The contention is that the first paragraph of the Revenue Act in question, which levies a tax of $100.00 on every foreign construction company with its

chief office outside of the State, is unconstitutional and void in that it discriminates against non-residents.

The said paragraph standing alone does not present a question of discrimination, and if it did, the complainant Wright was not affected by it as he was not a foreign construction company. There was no issue submitted to the jury upon the question of Wright's citizenship or as to whether he was a foreign construction company or as to where he had his chief office. The question submitted to the jury was set out in issues 6 and 7; first, whether Wright paid the privilege tax and procured a license, *as he was required to do,* to which the jury answered "No," and, second, as to whether he had at any time paid the privilege tax and procured a license, *as he was required to do,* and if so the dates thereof, to which the jury answered "yes," giving the dates respectively. The proof as to where Wright had his chief office was conflicting and was not authoritatively determined by the Court. The location of Wright's chief office and the amount of tax he was required to pay, and did pay, were facts for the jury to pass upon. The Chancellor and the State Supreme Court could act only upon the issues as found by the jury.

A sufficient answer to this assignment is that it ignores entirely the construction placed upon the enactment by the Tennessee Supreme Court. That the said enactment as construed by the State Court is not unconstitutional, see reasoning and authorities cited under the first assignment herein.

REPLY TO THIRD ASSIGNMENT.

A sufficient reply to this assignment is found in the decree of the Supreme Court of Tennessee, as follows:

> "As to R. M. Hall, the bill is dismissed on the ground that he was only liable, as surety on the contract, and the jury having found in response to issue No. 2, that nothing was due on the contract, there could in no event be a recovery against the said Hall."
>
> Record, p. 134.

And likewise, in view of the said finding of the jury in response to Issue No. 2, there should be no recovery against the Jackson Construction Company. However, the questions raised by the Third Assignment do not appear to have been made in the State Supreme Court, but are raised here for the first time, and involves no Federal question.

CONSTRUCTION OF WORKS OF A PUBLIC NATURE.

The statute in question requires persons, firms and corporations engaged in building railroads, streets, bridges and other works of a public nature to take out a license and pay a privilege tax, the amount of the tax being regulated with respect to the location of the chief office of the one seeking to exercise the privilege. Both the State and the public have an interest or concern in such business or enterprises. It is one of public concern, and therefore subject to the State's police power to regulate, as are slaughter houses, butchers, bankers, physi-

cians, lightning rod agents, auctioneers, warehouses, elevators, fire and life insurance, and numerous other occupations, the power in the States to regulate which has been recognized by this Court.

Brass v. North Dakota, 153 U. S. 391; 38 L. Ed. 757.
La Tourette v. McMaster, decided by U. S. Supreme Court January 20, 1919.
Toyota v. Hawaii, supra.
Bradley v. Richmond, supra.
Cargill v. Minn., supra.
Southwestern Oil Co. v. Texas, supra.

The United States Supreme Court has heretofore held that the State has the power to say who shall engage in the construction of its public works.

Heim v. McCall, 239 U. S. 175; 60 L. Ed. 206.

It therefore follows that the State of Tennessee not only had the power to say that persons, firms, and corporations, having their chief office outside the State, must pay a higher tax for engaging in the construction of works of a public nature in said State, than is required of those having a chief office within the State, but the State could have gone further, as was done in the case of *La Tourette v. McMaster, supra*, and have confined the license to residents of Tennessee alone.

La Tourette v. McMaster, U. S. Supreme Court, Decided January 20, 1919.

EVERY PRESUMPTION INDULGED IN FAVOR OF CONSTITUTIONALITY OF STATE STATUTE.

If the contention of opposing counsel that the construc-
on of the State statute by the State Supreme Court is
ot controlling, the Federal Supreme Court would not
lopt a construction of the statute which would render
, or any part of it, void as being repugnant to the Fed-
al Constitution, when a reasonable construction can be
lopted which would save the statute in question.

The statute in question admits of numerous construc-
ons which would save it from criticism. For illustra-
on, it might be said that the two leading paragraphs
entioning foreign and domestic construction companies
d the location of their chief office, as determining the
nount of the tax, refer to corporations, and that the
ird paragraph to the effect that the above tax shall be
id by persons, firms and corporations may be con-
rued as requiring all persons and firms to pay the
naller tax, the words "above tax" to be taken as re-
rring to the figures first preceding. If the greater tax
applied to corporations only, then the criticism of the
atute must vanish, as corporations are not citizens un-
r the 14th Amendment and could not complain of the
scrimination, and further, Wright was not a corpora-
on.

Or the words "chief office" might be construed as ap-
ying to the chief office in connection with the particular
ork carried on in Tennessee.

Furthermore, if the statute were repugnant to the Federal Constitution because of the alleged discrimination, it would be void only to the extent that it discriminates, that is, to the extent of the difference between $25.00 and $100.00.

Or if the entire paragraph providing that foreign construction companies shall pay $100.00 per annum be stricken out, it would leave plaintiff in error in no better plight, for there would still remain the paragraph imposing the $25.00 tax, followed by the language that the "above shall be paid by persons, firms and corporations engaged in the business of constructing bridges, etc." It seems to us that, in any event, the claim made in behalf of plaintiff in error that a Federal question is involved in the judgment of the State Court, is lacking in substance, or else that Wright is not in position to raise it, he not being a corporation.

We understand the rule of this Honorable Court to be that every legitimate presumption will be indulged in favor of legislative enactments. As said by the United States Supreme Court in its opinion in the case of *Sweet v. Rechel*:

> "But in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is a well-settled rule of constitutional exposition, that if a statute may or may not be, according to circumstances, within the limits of legislative

authority, the existence of the circumstances necessary to support it must be presumed. *Talbot v. Hudson*, 16 Gray, 417, 422; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 128 (3: 162, 175); *Union P. R. Co. v. United States* ('Sinking Fund Cases') 99 U. S. 700, 718 (25: 496, 501)."

Sweet v. Rechel, 159 U. S. 392; 40 L. Ed. U. S., p. 194.

REPLY TO ARGUMENTS OF PLAINTIFF IN ERROR.

On pages 21 to 23 of the brief filed in behalf of plaintiff in error, appears what counsel terms "every portion of the revenue law passed by our legislature in 1909, under which the tax was held to be payable, etc."

The statement might be misleading. Only a very small portion of the State Revenue Law is set out. This makes no material difference, except that the Court should not be left under the impression that the revenue law was enacted to apply only to merchants and construction companies. The statute declares many occupations to be privileges and makes the payment of a tax the condition of the issuance of a license.

The statement by opposing counsel that the tax is for revenue only may not be correct. We note a difference in the amount of the tax as applied to different classes determined by the location of a chief office, and this may have been for purposes of regulation as well as taxation.

Judge Cooley in his work on Taxation (3d Ed., p. 14), says:

"They (privilege taxes) may be intended to discourage trades and occupations which may be useful

and important when carried on by a few persons under stringent regulations, but exceedingly mischievous when thrown open to the general public and engaged in by many persons. An example is the heavy tax imposed in some states and in some localities in other states on those engaged in the manufacture or sale of intoxicating drinks. Two purposes are generally had in view in imposing such a tax—to limit the business to a few persons, in order to more efficient and perfect regulation, and also to produce a revenue. As no one will pay the tax who does not expect to be reimbursed the expense from the profits of sales, it is obvious that the heavier the tax the fewer can afford to pay it, and it may be made so heavy that no one can afford to pay it, and then it is prohibitory."

And again, on page 242 of the same work, he says:

"On the other hand, one purpose of taxation sometimes is to discourage a business, and perhaps put it out of existence. Then it is taxation without any idea of protection attending the burden. This has been avowedly the purpose in the case of some Federal taxes, while in others the burden has been laid on subjects which by State legislation were put out of the protection of the law. The taxes have nevertheless been sustained."

Foster v. Speed, 120 Tenn., pp. 474-475.

See also on this point the opinion of Mr. Justice Harlan in the case of *Bradley v. Richmond*, *supra*.

Counsel for plaintiff in error on page 24 of their brief argue that "Before a citizen of Alabama can come into the State of Tennessee and engage in the construction

business upon equal terms with the citizens of Tennessee," he must move his chief office to Tennessee. While the deduction does not follow from the statute as construed by the State Court, yet we ask, if it is true, what must the resident or citizen of Tennessee do, who has his chief office in Alabama? Would he not also be required to move it to Tennessee if he desired to engage in construction work on equal terms with the citizen of Alabama? Where is the discrimination?

Opposing counsel argue the case as though the location of a chief office and citizenship were the same. It is now well recognized that a person may have his residence in one State, his citizenship in another, and his chief office in still another.

REPLY TO AUTHORITIES RELIED ON BY PLAINTIFF IN ERROR.

The three principal cases relied on by plaintiff in error involve questions of commerce and are not applicable to this case. The first case cited is *Ward v. Maryland*, 12 Wall. 418, 20 L. Ed. 449, where the Court held unconstitutional a statute of Maryland making it a penal offense for any person "not being a permanent resident of that State" to sell, offer or expose for sale in the City of Baltimore, any goods, wares, or merchandise whatever, other than agricultural products, and articles manufactured in the State of Maryland, without obtaining a license for the purpose. The ground for the invalidity was that it discriminated against the property and prod-

ucts of people of other states. No such ground can be found in the statutes involved in the case at bar.

The next case cited by counsel for the plaintiff in error, *Walling v. Michigan*, 116 U. S. 446; 29 L. Ed. 691 (1886) is another of the well-known line of cases in which this Court has had to deal with State legislation imposing discriminating taxes against the products of other states. The facts in *Walling v. Michigan, supra* are so different from the facts in the case at bar and the operation of the statute in that case was so manifestly different from the operation of the statute now in question, that we are at a loss to understand why counsel for the plaintiff in error should have cited it to sustain its position as to the repugnance of the law in question to the Constitution of the United States. In that case it was held that a State law which imposes a specific tax upon persons engaged in the business of *selling liquor* at wholesale or of *soliciting* or *taking orders* for such liquor to be *shipped into* the State from places out of the State, not having their *principal place of business* in the State without imposing a like tax upon persons engaged in a like business with reference to liquors manufactured in the State, is unconstitutional and void because such a law discriminates unfavorably against the citizens and products of other states. It is obvious that the statute involved in the case at bar has no such operation. It does not apply to commerce from other states, and does not discriminate against any person on account of residence or citizenship.

Nor was the law construed in *Darnell v. Memphis*, 208 U. S. 113; 52 L. Ed. 413 (1908) in any respect similar in its operation to the law now under review. In that case

a statute imposed a tax upon the products of the soil of other states, but exempted like products when produced from the soil of Tennessee, and it was held that such a law was unconstitutional as it directly interfered with interstate commerce. Mr. Justice White, in delivering the opinion of the Court, said (p. 125):

> "* * * the disputed tax, which the Court below sustained, was a direct burden upon interstate commerce, since the law of Tennessee in terms discriminated against property the product of the soil of other states, brought into the State of Tennessee, by exempting like property when produced from the soil of Tennessee. * * *"

The next case cited is that of *Southern R. Co. v. Greene*, 216 U. S. 400-418, 54 L. Ed. 536. That it is wholly inapplicable to the facts of the case at bar, is manifest from the statement of the question for determination set forth in the opinion rendered by Mr. Justice Day, who said:

> "The important Federal question for our determination in this case is: When a corporation of another State has come into the taxing State, in compliance with its laws, and has therein acquired property of a fixed and permanent nature, upon which it has paid all taxes levied by the State, is it liable to a new and additional franchise tax for the privilege of doing business within the State, which tax is not imposed upon domestic corporations doing business in the State of the same character as that in which the foreign corporation is itself engaged?"
>
> *Southern R. Co. v. Greene*, 54 L. Ed. U. S., p. 539.

No such question is involved in the case at bar. The statute in this case applies equally to every person, regardless of citizenship or residence, as its practical application demonstrates. For illustration, a citizen and resident of Tennessee and a citizen and resident of Alabama, each having their chief offices in the State of Alabama, if they desire to engage in railroad construction work in Tennessee, must alike pay the $100.00 tax per annum. On the other hand, if said persons have their respective chief offices in the State of Tennessee, they may alike pursue said business by payment of the $25.00 tax. It does not lie in the mouth of a non-resident to complain that he is subjected to the same law with a resident.

As said by this Honorable Court in the said case of *Southern R. Co. v. Greene, supra,* opinion delivered by Mr. Justice Day:

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation."

We respectfully submit that the Writ of Error should be dismissed and the judgment of the Supreme Court of Tennessee affirmed.

Respectfully submitted,

JOSEPH W. COX,
W. H. BIGGS,
R. F. SPRAGINS,
Attorneys for Defendants in Error.

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Supreme Court of the United States

October Term, 1918, No. 283

A. P. CHALKER, ADMINISTRATOR *DE BONIS NON* OF THE ESTATE OF J. W. WRIGHT, JR., DECEASED, AND C. E. PIGFORD, et al, PLAINTIFFS IN ERROR,

vs.

THE BIRMINGHAM AND NORTHWESTERN RAILWAY COMPANY, et al.

BRIEF FOR DEFENDANTS IN ERROR

Statement of Case

JOSEPH W. COX,
For Defendants in Error.

W. F. ROBERTS CO. WASHINGTON D. C.

Supreme Court of the United States

October Term, 1918, No. 283

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vs.

THE BIRMINGHAM AND NORTHWESTERN RAILWAY COMPANY, et al.

BRIEF FOR DEFENDANTS IN ERROR

Statement of Case

This cause originated in the Chancery Court of Madison County, Tennessee.

The original bill with amendments filed by J. W. Wright, Jr., a railroad sub-contractor sought to recover from his contractor for work alleged to have been done in the construction of a short line railroad and to have a line declared against the railroad for the amount of recovery. (Original Bill, R. pp. 1-49.)

The answers of the defendants denied that Wright was entitled to recover. They averred that he had been overpaid and that he had breached his contract to the damage of the contractor in a large amount, for which a recovery was sought by way of set-off. (Answers of defendants, R. pp. 50-98.)

The answers made the further defense that Wright had failed to pay the privilege tax and to obtain a license as required by law before undertaking the work, and was not therefore entitled to recover upon his contract or upon any claim growing out of the work carried on in violation of law. (R. pp. 60, 61; 89; 97.)

In the course of the trial, fourteen issues were submitted to and answered by a jury (R. pp. 99-102). To the question as to the amount, if any, due the administratrix of Wright's estate for work done and materials furnished under his contract in constructing the railroad, the jury answered, "None." To the question as to the reasonable value of the benefits received by reason of the work done and materials furnished by Wright in constructing the railroad, over and above the amounts paid him and over and above any damages sustained by reason of his failure to complete the road according to contract, the jury answered, $9,403.80." To the question as to whether Wright at the time he contracted relative to the construction of the railroad had paid the privilege tax and procured the license required by law, the answer was, "No." To the question as to whether Wright at any time paid the privilege tax and procured a license in either Madison, Crockett or Dyer Counties, the jury answered, "Yes. Paid in Crockett County, March 18th, 1912. Paid in Madison County, March 14th, 1912. Paid in Dyer County, March 15th, 1912."

The defendants moved and were granted a new trial as to certain of these issues, including issue No. 4 (R. p. 112). Thereafter the Chancellor again submitted three issues to the jury (R. p. 128), and, the complainant declining to offer any evidence upon the issues so submitted, they were answered by direction of the court as follows:

To issue No. 1: "The said J. W. Wright, Jr., did no work for which he is entitled to pay."

To issue No. 2: "The said J. W. Wright, Jr., did no work and furnished no materials for which he is entitled to pay."

To issue No. 3: "There were no benefits derived by said Railroad from any material or work done by the said J. W. Wright, Jr." (R. p. 129.)

The Chancellor thereupon dismissed the bill as to all defendants, the dismissal being based upon the findings of the jury and also upon the ground that Wright had not paid any privilege tax as required by law.

The complainant thereupon appealed to the Supreme Court of Tennessee. The errors assigned in that court are not set out in the record, and can only be inferred from the opinion. (R. pp. 134-137.) It was held that the Chancellor erred in granting a new trial as to part of the issues instead of granting it as to all, that the new trial was therefore void, and that the result was to reinstate the finding under issue No. 4 that the value of the benefits received by reason of the work done and material furnished by the complainant was $9,403.80.

It was further held, however, that the Chancellor nevertheless properly dismissed the bill on the ground that Wright had not paid the privilege tax required by law before the work was performed. The opinion upon this point reads as follows:

> The question remains whether the complainant is entitled to judgment on the amount found for him under issue No. 4—$9,403.80. The solution of this question depends on the construction of sec. 4 of Chap. 478 Acts of 1909. That section, so far as necessary to quote here, reads:

"Section 4. Be it further enacted, that each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation, on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county clerk as provided by law for the collection of revenue.

* * * * * * *

"Each foreign construction company, with its chief office outside of this State, operating or doing business in this State, directly or by agent, or by any subletting contract each, per annum in each county—$100.00.

"Each domestic construction company and each foreign construction company, having its chief office in this State, doing business in this State, each, per annum, in each county—$25.00.

"The above tax shall be paid by persons, firms, or corporations engaged in the business of constructing bridges, water-works, railroads, street-paving construction work, or other work, or structure of a public nature."

* * * * * * *

Complainant insists that section 4 discriminates between citizens of Tennessee and those of other States requiring the latter to pay a tax of one hundred dollars for the privilege of doing railroad construction business here, while citizens of this State are required to pay only twenty-five dollars, hence that the section is in conflict with Art. IV., sec. 2, subsec. 1, of the Federal Constitution, and also with the fourteenth amendment to the same instrument. In our judgment the construction suggested is not a sound one. The determining feature in the legislation quoted is the having of one's chief office in this State. Any citizen of this State, as well as any citizen of a foreign State, who has his chief office out of the State, must pay the one hundred dollars tax; so of any domestic corporation, as well as foreign corporation, having its chief office out of the State. Any foreign corporation or citizen of another State, or firm, as well as domestic

corporations, citizens of the State, and firms of this State, having its or their chief office in this State, are all alike entitled to carry on a railroad construction business here on the payment of twenty-five dollars. There is no discrimination at all.

It is not denied that complainant failed to pay the tax before he did the work. After the work was performed and before suit was brought he paid the twenty-five dollar tax. This was too late, even if he had paid the one hundred dollars, the tax applicable to his situation, he being a citizen of Alabama with his chief office there. It was too late because payment of a privilege tax and procurement of a license after the privilege has been exercised, though before suit is brought, will not give the party so paying any right to maintain suit. Saule vs. Ryan, 53 S. W. (Tenn.), 977. The complainant having acted in violation of a statute in undertaking and transacting the business cannot recover. Stevenson v. Ewing, 3 Pick. (87 Tenn.), 46; Pile vs. Carpenter, 118 Tenn., 288.

The result is the decree of the chancellor dismissing the bill must be affirmed with costs. (R. pp. 136-137.)

ASSIGNMENTS OF ERROR

The assignments of error in this court, three in number, assert in substance that the provision relating to construction companies in section 4 of the State Revenue Act (Chapter 479, Acts of 1909) is violative of section 2, Article IV, and of the 14th Amendment of the Constitution of the United States in that it abridges the privileges and immunities of citizens of the United States not residents of Tennessee and denies to citizens of the United States not residents of Tennessee equal protection of the law. (R. pp. 145-147.)

ARGUMENT

There Has Been No Discrimination Against the Plaintiff in Error

It will be noted that the contract which forms the basis of the action is dated April 13, 1911 (R. p. 3), that the privilege tax was paid in the three counties through which the short line extended on March 14, 15, and 18, 1912 (R. p. 101), and that the suit was filed March 19, 1912 (R. p. 1).

It will also be noted that the tax actually paid by Wright immediately before the filing of the suit was not the hundred dollar tax but the twenty-five dollar tax.

In paying the tax, which the State accepted, Wright obviously took the position that he was entitled to the lower rate. It was not until the defendant made the point that the payment was too late that he began to contend that the statute imposed on him the $100 tax.

The State court did not hold that if Wright had paid the twenty-five dollar tax in time he could not have recovered, but that he could not recover because *the payment was too late* and would have been too late even if he had paid the hundred dollar tax, which as he then contended and as the court remarked, would have been applicable to his situation. There is nothing, however, to show that the State authorities would not have accepted the twenty-five dollar tax if it had been tendered before instead of after the work was done, nor that if the twenty-five dollar tax had been paid in time the recovery would have been denied.

It is difficult to see, therefore, how the contention can be made that Wright was discriminated against so far as the hundred dollar tax is concerned. He

stood, and his administrator stands, in the position in which any resident of the State would have stood who failed to pay the twenty-five dollar tax in time.

No discrimination having been made against him, it would seem insufficient to justify a reversal to establish the proposition relied on in the opposing brief, that the act is unconstitutional "in so far as the same applies to citizens of other States than Tennessee" (p. 18), but necessary to go further and show that the statute is wholly unconstitutional so far as it relates to construction companies.

Only one whose rights are invaded by a statute is entitled to question its validity. *Red River Valley National Bank* v. *Craig,* 181 U. S. 548; *Williams* v. *Eggleston,* 170 U. S. 304; *Hagar* v. *Reclamation District,* 111 U. S. 701.

Wright having received the most favorable treatment that a citizen of the State could have received under the same circumstances cannot complain of having been discriminated against as a citizen of another State.

The Statute as Construed by the Supreme Court of Tennessee is Valid

But even if the plaintiff in error were in position to raise the question, it is submitted that the statutes as construed by the State Supreme Court is clearly constitutional.

The $100 tax is imposed upon "each foreign construction company, *with its chief office outside this State.*" The $25 tax is imposed on "each domestic construction and each foreign construction company, *having its chief office in this State.*" And it is provided that "the above tax shall be paid by persons, firms or corporations *engaged in* the business of constructing * * * railroads

* * * or other *work*, or structure *of a public nature*."

Construing these provisions the Supreme Court of Tennessee says:

> The determining feature in the legislation quoted is *the having of one's chief office in this State*. Any citizen of this State as well as any citizen of a foreign State, who has his chief office out of this State, must pay the $100 tax; so of any domestic corporation, as well as foreign corporation, having its chief office out of this State. Any foreign corporation or citizen of another State, or firm, as well as domestic corporations, citizens of this State, and firms of this State, having its or their chief office in this State are all alike entitled to carry on a railroad construction business here on the payment of $25. *There is no discrimination at all.* (Italics ours.)

We do not understand the brief of plaintiff-in-error to question the power of the State to classify construction companies or to attack as arbitrary the basis of classification under the statute *as thus construed by the State Court.*

On the contrary it seems impliedly conceded that the Act *as construed by the State Court* is constitutional, the effort in the argument being to show that the construction is improper and unwarranted. Thus on page 20 it is said:

> Under the facts that part of the Court's opinion is clearly merely a dictum and not binding upon this Court, it not being within the province of the Supreme Court of Tennessee to construe away a plain discrimination in the statute by such a forced and unwarranted construction.

and again at page 37:

> if this statement can be considered more than a mere dictum and is the solemn holding of the Court on that

question it is an interpolation not warranted by any language used in the statute and * * * the Supreme Court of the United States is not bound by this statement * * * .

Under the decisions of this Court as we understand them, the construction placed on a statute by a State Court is to be accepted in determining whether there is unconstitutional discrimination against residents of other States. *Forsyth* v. *Hammond*, 166 U. S. 506, *Wade* v. *Travis County*, 174 U. S. 499, 508, *LaTourette* v. *Insurance Commissioners*, decided January 20, 1919, *Cargill Company* v. *Minnesota*, 180 U. S. 452, 466; *Flanigan* v. *Sierra County*, 196 U. S. 553, 562; *Orr* v. *Allen*, *decided* December 9th, 1918.

Giving the statute the meaning placed upon it by the Supreme Court of the State, the view expressed by that Court as to its constitutionality is thought to be clearly in harmony with the opinions of this Court.

In *Armour* v. *Virginia*, 246 U. S. 1, this court considered the Virginia statute imposing an annual license fee on persons carrying on a merchandise business in the State but excluding from liability for license manufacturers offering for sale at the place of manufacture goods, wares and merchandise manufactured by them. The distinguishing feature in the classification as applied to manufacturers is whether the manufacturer sells in Virginia at the place of manufacture. The statute was held to be constitutional—the exemption from the license tax being "open to all whether non-citizens or even non-residents who manufacture in Virginia" and sell at the place of manufacture. For essentially the same reasons it would seem that the Tennessee statute imposing different license tax rates on construction companies depending upon their having their chief offices in the State would also be constitutional.

In *LaTourette* v. *Insurance Commissioners*, *supra*, the

Court considered the validity of the South Carolina statute providing for licensing insurance brokers and that only such persons may be licensed as are residents of the State and have been licensed insurance agents of the State for at least two years. That statute, like the Tennessee statute now under consideration, was attacked on the ground that it violated section 2, Article IV, and the 14th Amendment, in that it denied to the petitioner, a citizen of New York, the privilege of acting as an insurance broker in South Carolina. In construing the statute the State court had used the following language:

> A citizen of any State in the Union who is a resident of this State and has been a licensed insurance agent of this State for at least two years may obtain a broker's license. On the other hand, a citizen of this State who is not a resident of this State and has not been a license insurance agent of this State for two years, may not be licensed. No discrimination is made on account of citizenship; it rests alone upon residence in the State and experience in the business (the court distinguishing between citizenship and residence).

This Court accepted the construction of the State Court as binding, held that the business is subject to the regulating power of the State, that the statute as construed by the State Court avoided discrimination against citizens of other States, and therefore is clearly constitutional. The reasoning seems to apply with full force to support the construction placed by the State Court upon the statute here involved.

To similar effect are *New York* v. *Roberts* 167 U. S. 658, 662.

(Quoted in *Southern Railway* v. *Green* 216 U. S. 400, 415, and *Reymann Brewing Co.* v. *Brister* 179 U. S. 445, 451-453.)

It is also to be observed that the construction companies dealt with by the Tennessee statute are those engaging *in work of a public nature*, and for this reason are peculiarly subject to State regulation and control.

In *Heim* v. *McCall*, 239 U. S. 175, it was held that a provision of the labor law of New York that citizens of the State shall be given preference on public works constructed under the direction of the State or its municipalities is not violative of either section 2, Article IV, or the 14th Amendment.

The New York statute specifically referred to the construction of public works by the State or its municipalities, and the suit related to certain contracts with the Public Service Commission for the construction of a rapid subway system for New York City. It would seem that for the same reasons that the State of New York could determine who should be employed in the construction of a subway system, the State of Tennessee could also determine who should construct its railway lines, and might, if deemed desirable, confine its licenses for such construction work to residents of the State, instead of merely classifying construction companies for taxation and regulation upon the basis of whether or not they had their chief offices in the State.

It is respectfully submitted that the judgment of the Supreme Court of Tennessee should be affirmed.

JOSEPH W. COX,
For Defendants in Error.

CHALKER, ADMINISTRATOR DE BONIS NON OF ESTATE OF WRIGHT, ET AL. *v.* BIRMINGHAM & NORTHWESTERN RAILWAY COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 283. Argued March 25, 26, 1919.—Decided April 21, 1919.

A state law making the amount of annual tax for the privilege of doing railroad construction work depend on whether the person taxed has his chief office in the State, viz., $25.00 if he has and $100.00 if

he has not—discriminates against citizens of other States, in violation of Art. IV, § 2, of the Constitution. P. 526.

And a citizen of another State who would be liable for the larger tax, if valid, may question its validity without first tendering the lower tax. P. 528.

138 Tennessee, 145, reversed.

THE case is stated in the opinion.

Mr. C. E. Pigford, with whom *Mr. Watson E. Coleman* and *Mr. W. N. Key* were on the brief, for plaintiffs in error.

Mr. R. F. Spragins, with whom *Mr. Joseph W. Cox* and *Mr. W. H. Biggs* were on the briefs, for defendants in error.

The act applies alike to residents and nonresidents; to citizens of Tennessee as well as to citizens of other States. To argue that few non-resident persons, firms or corporations have their chief offices in Tennessee, or that few resident in Tennessee have their chief offices elsewhere, does not prove discrimination. It is a fact of common knowledge that many have their chief offices in States other than the States in which they reside or are domiciled.

If it is competent for the legislature to exempt from the payment of a privilege tax merchants having their manufacturing plants where goods are offered for sale located within the State, and yet impose the tax on those merchants who have their places of manufacture in another State (*Armour & Co.* v. *Virginia*, 246 U. S. 1,) manifestly it was competent for the legislature, for a stronger reason, to make the distinction made in this statute treating all alike under the same circumstances. *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445.

The statute can be sustained as a tax measure, and also under the police power as regulating a business. It

is within the legislative power of classification, because the distinction made is based on substantial reasons.

The business of constructing railroads and other like public works is peculiar. Ordinarily, such construction concerns have and should have the chief office, or a chief office, at or near the work of construction. Usually such contracts involve large sums, and many laborers and sub-contractors are employed on the work. Generally the common labor employed consists of foreigners. The State and the public have an interest in the proper performance of such work, as the public service is involved, and the right of eminent domain is given. It may be deemed important to the proper performance of such work that the chief office be located at or near it. As indicated in the case at bar, the complainant neglected his work and breached his contract, as found by the jury, and his bill shows that he failed to settle with his sub-contractors. Those undertaking such contracts frequently fail and become bankrupt. In practically all such cases, the rights and claims of laborers, sub-contractors and material-men are vitally affected, and it is important that they have a remedy by suit and a personal judgment as well as by attachment and garnishment, which they probably would not have except when the chief office of the principal contractor is within the State.

The State is further justified in making the distinction for the reason that the concern having a chief office within the State would likely be liable for and pay *ad valorem* taxes as well as the privilege tax; it would likely have funds, contracts, securities and other property within the State at its chief office subject to state taxation; it would, under the laws of Tennessee, be subject to suit and service of process and personal judgment in the State, which would not be the case if there were no chief office there; and it would be subject to garnishment in the State as to sums due to sub-contractors and laborers, and would

have there its books of account and other documents and papers within the jurisdiction of the state courts, and subject to subpœna duces tecum. Furthermore, it is more difficult to collect the privilege tax from those having their chief office out of the State. [Among the cases cited were: *Heim* v. *McCall*, 239 U. S. 175; *McPherson* v. *Blacker*, 146 U. S. 1; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157; *Hayes* v. *Missouri*, 120 U. S. 68; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 293; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 76; *Toyota* v. *Hawaii*, 226 U. S. 190; *Bradley* v. *Richmond*, 227 U. S. 477; *Cargill Co.* v. *Minnesota*, 180 U. S. 452; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114.]

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The point for determination is the liability of J. W. Wright, Jr., a citizen and resident of Alabama with his chief office therein, who engaged in the business of constructing a railroad in Tennessee, for the tax prescribed by § 4 of "An Act to provide revenue for the State of Tennessee and the counties and municipalities thereof," approved May 1, 1909 (Acts of Tenn., 1909, c. 479, pp. 1726, 1727, 1735) which provides:

"Sec. 4. Be it further enacted, That each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the County Court Clerk as provided by law for the collection of revenue.

* * * * * * * *

"Each foreign construction company, with its chief office outside of this State, operating or doing business

in this State, directly or by agent, or by any subletting contract, each, per annum, in each county . . . $100.00

"Each domestic construction company and each foreign construction company, having its chief office in this State, doing business in this State, each, per annum, in each county . . . . . $25.00.

"The above tax shall be paid by persons, firms, or corporations engaged in the business of constructing bridges, waterworks, railroads, street-paving construction work, or other structures of a public nature."

Replying to the claim that the statute in effect discriminates against citizens of other States, the Supreme Court of Tennessee, 138 Tennessee, 145, 152, 153, said: "The determining feature in the legislation quoted is the having of one's chief office in this State. Any citizen of this State, as well as any citizen of a foreign State, who has his chief office out of the State, must pay the $100 tax; so of any domestic corporation, as well as foreign corporation, having its chief office out of the State. Any foreign corporation or citizen of another State, or firm, as well as domestic corporations, citizens of this State, and firms of this State having its or their chief office in this State, are all alike entitled to carry on a railroad construction business here on the payment of $25. There is no discrimination at all."

With this conclusion we are unable to agree. Accepting the construction placed upon it by the Supreme Court, we think the quoted section does discriminate between citizens of Tennessee and those of other States by imposing a higher charge on the latter than it does on the former, contrary to § 2, Art. IV of the Federal Constitution—"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The power of a State to make reasonable and natural classifications for purposes of taxation is clear and not questioned; but neither under form of classification nor

otherwise can any State enforce taxing laws which in their practical operation materially abridge or impair the equality of commercial privileges secured by the Federal Constitution to citizens of the several States.

"Excise taxes, it is everywhere conceded, may be imposed by the States, if not in any sense discriminating; but it should not be forgotten that the people of the several States live under one common Constitution, which was ordained to establish justice, and which, with the laws of Congress, and the treaties made by the proper authority, is the supreme law of the land; and that that supreme law requires equality of burden, and forbids discrimination in State taxation when the power is applied to the citizens of the other States. Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system." *Ward* v. *Maryland*, 12 Wall. 418, 431; *Guy* v. *Baltimore*, 100 U. S. 434, 439; *Blake* v. *McClung*, 172 U. S. 239, 254; *Darnell & Son Co.* v. *Memphis*, 208 U. S. 113, 121.

As the chief office of an individual is commonly in the State of which he is a citizen, Tennessee citizens engaged in constructing railroads in that State will ordinarily have their chief offices therein, while citizens of other States so engaged will not. Practically, therefore, the statute under consideration would produce discrimination against citizens of other States by imposing higher charges against them than citizens of Tennessee are required to pay. We can find no adequate basis for taxing individuals according to the location of their chief offices—the classification, we think, is arbitrary and unreasonable. Under the Federal Constitution a citizen of one State is guaranteed the right to enjoy in all other States equality of commercial privileges with their citizens; but he cannot have his chief office in every one of them.

It is insisted that no tender of any sum for license tax was made in time, and therefore plaintiffs in error cannot question the validity of the enactment because of discrimination. But the Supreme Court expressly declared that the statute fixed the liability of Wright at one hundred dollars. A tender of less would have availed nothing and it was therefore unnecessary.

The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.